MISSOURI APPROVED
JURY INSTRUCTIONS

Eighth Edition

Missouri Supreme Court
Committee on
Jury Instructions

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Prepared by the
MISSOURI SUPREME COURT COMMITTEE
ON
CIVIL JURY INSTRUCTIONS

Compiled and Edited by

ROBERT T. ADAMS
Kansas City
Chair

JOAN M. LOCKWOOD
St. Louis
Reporter

STEPHEN H. RINGKAMP
St. Louis
Member

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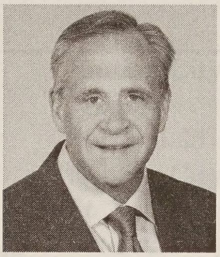
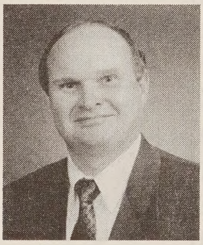
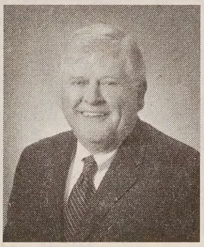


Robert T. Adams, Chair
Shook, Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, MO 64108-2613
rtadams@shb.com

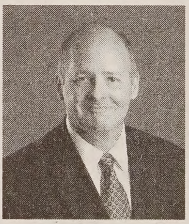
Joan M. Lockwood, Reporter
Gray, Ritter & Graham, P.C.
Gateway One—On the Mall
701 Market Street—Suite 800
St. Louis, MO 63101-1826
jlockwood@grgpc.com



Stephen H. Ringkamp, Chair Emeritus
The Hullverson Law Firm
1010 Market Street—Suite 1480
St. Louis, MO 63101-2091
sringkamp@hullverson.com

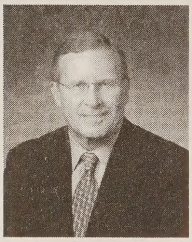


David W. Ansley
Hall, Ansley, Rodgers & Sweeney P.C.
3275 East Ridgeview Street
Springfield, MO 65808
dansley@hallansley.com

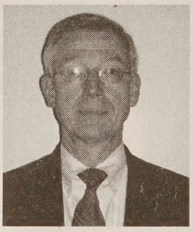


James P. Frickleton
Bartimus, Frickleton, Robertson & Rader, P.C.
11150 Overbrook Road—Suite 200
Leawood, KS 66211
jimf@bflawfirm.com.com

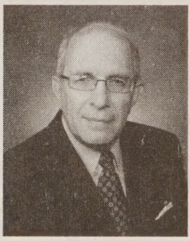
MISSOURI SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS



Robert A. Henderson
Polsinelli PC
900 W. 48th Place—Suite 900
Kansas City, MO 64112-1895
rhenderson@polsinelli.com



Stephen M. Schoenbeck
Law Office of Stephen M.
Shoenbeck
255 Blackmer Place
St. Louis, MO 63119
schoensp@sbcglobal.net



Louis J. Leonatti
Leonatti & Baker
123 Jackson Street
P.O. Box 758
Mexico, MO 65265
lou@leonatti-baker.com

Albert M. Spradling, III
Spradling & Spradling
1838 Broadway
P.O. Drawer 1119
Cape Girardeau, MO 63702-1119
spradlaw@spradlaw3.com

Gretchen Myers
The Law Offices of Gretchen
Myers, P.C.
222 S. Central Ave. Suite 675
St. Louis, MO 63105
gmyers@gmyerslaw.com

Jennifer J. Artman,
Committee Assistant
Shook, Hardy & Bacon LLP
2555 Grand Boulevard
Kansas City, MO 64108-2613
jartman@shb.com

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CURRENT AND PAST MAI COMMITTEE MEMBERS

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SUPREME COURT OF MISSOURI

en banc

June 9, 2020
Effective January 1, 2021

ORDER

The forms of Jury Instructions, Notes on Use, and Committee Comments, as finally submitted to the Court by the Committee on Jury Instructions and as set forth in Missouri Approved Jury Instructions (MAI), Eighth Edition, published by West Group, Eagan, Minnesota, copyright 2020, are approved and hereby adopted by the Court.

The aforesaid forms must be used on and after January 1, 2021, and may be used prior thereto without such use being presumed to be error.

Day – to – Day

GEORGE W. DRAPER III
Chief Justice

IN THE SUPREME COURT OF MISSOURI
EN BANC

Tuesday, March 6, 1962

Re: Appointment of Supreme Court Committee on Jury Instructions

ORDER

Acting on a resolution adopted by the Board of Governors of the Missouri Bar and a resolution adopted at the 1961 annual meeting of the Missouri Bar, the Court hereby appoints a committee to study the problem of jury instructions and to advise the Court from time to time of the Committee's recommendations with respect thereto. The Committee is directed to consider means for simplification of instructions to juries including consideration of whether and to what extent standardized or pattern instructions might be used for this purpose.

The Committee is as follows:

Judge Tom J. Stubbs, Chairman, Kansas City
Professor John S. Divilbiss, Reporter, Columbia

Judge William M. Kimberlin — Harrisonville
Eugene E. Andereck — Trenton
Reed O. Gentry — Kansas City
Horace S. Haseltine — Springfield
James W. Jeans — St. Louis
John H. Lashly — St. Louis
John P. Montrey — St. Louis
James E. Reeves — Caruthersville
Harry P. Thomson, Jr. — Kansas City
O.W. Watkins, Jr. — St. Joseph

The above are appointed to serve as the "Supreme Court Committee on Jury Instructions" until June 30, 1964 and until their successors are appointed.

The Committee may recommend to this Court the appointment of such number of Associate Members as the Committee deems desirable.

/s/ Henry J. Westhues
HENRY J. WESTHUES, Chief Justice

1963 REPORT TO MISSOURI SUPREME COURT

The Supreme Court Committee on Jury Instructions having completed a portion of its work submits this report of its activities and recommendations.

GENERAL APPROACH

The Court's order appointing this Committee directed what measures be considered for simplifying instructions. This has been a primary goal. These instructions were written with a view to what would be easily understood by the average juror. We also recognize that sheer volume of words may itself be confusing to a juror, so we departed from our prolix past and cut the instructions to bare essentials. This was done, we believe, without any sacrifice of meaning or clarity and without any change of substantive law.

Each pattern instruction was also subjected to these four tests:

(1) Is it a correct statement of law?
(2) Is it a complete statement?
(3) Is it concise?
(4) Is it stated in language the average juror can understand?

Instructions are intended to inform the jury of the law and what their decisions must be based on that law. Too often instructions have served more as written arguments so that the jury reads a page of plaintiff's arguments and then a page of defendant's arguments. The instructions are the court's and the jury should so understand. The Committee has tried to write these instructions without the partisan flavor common in our present system.

MAJOR CHANGES

Method of Drafting

1. *Submitting Ultimate Issues*

Justice Cardozo once wrote that too much detail obscures rather than clarifies. His observation is demonstrated by a good many verdict directing instructions which, playing it safe, hypothesize every conceivable fact. A good many such hypothesizations are unnecessary, even under our existing system, but the lawyer's fears if not commendable are at least understandable. Lawyers are now required to chart a course between the Scylla of inadequate fact hypothesization and the Charybdis of commenting on the evidence. The legal coast is littered with the wreckage of cases navigated by those who could not find this elusive channel.

The origin of our present requirement is somewhat obscure. Instructions in early Missouri cases contained little recitation of evidentiary facts, but somehow the idea developed and gradually grew to its present proportions. Current decisions express the fear that unless evidentiary facts are hypothesized the jury may reach a conclusion without having gone through the proper preliminary mental processes. For example, hypothesizing excessive speed, negligence, causation and damage is not now adequate. Particular evidentiary facts indicating excessive speed must now be hypothesized and found true. Only then can the jury go to the next plateau and decide whether these evidentiary facts demonstrate excessive speed. The Committee believes that if a jury is so confused as to find excessive speed while at the same time believing evidence of proper speed, that jury will not be helped by a long recitation of evidentiary facts.

The recommended change is not without precedent. The courts currently approve humanitarian instructions which submit ultimate issues without evidentiary detail. Hypothesizing failure to keep a lookout which would have averted a collision is also accepted as an adequate submission although barren of evidentiary detail. There is no indication that juries so instructed have been handicapped by the brevity. In these cases evidentiary detail has simply been left to argument, and this is where it belongs.

Verdict directing instructions reduced to ultimate issues are easier for the jury to read and understand and they can express the law as accurately as our current evidentiary submissions. The Committee recommends that the ultimate issue hypothesization now permitted in humanitarian and lookout cases be extended to other verdict directing instructions.

2. *Submitting Burden of Proof*

Every court in the country has labored over the problem of simply and accurately telling the jury what is meant by burden of proof. To begin with the word "proof" has a myriad of meanings to laymen. To the scientist or engineer it may mean something approaching universal certainty. To the housewife it may be something more akin to intuition. The relative nature of "proof" is perhaps best understood by the drinker.

The Committee first considered adopting the short form burden of proof currently approved by this Court. This met with three objections. First, the words "preponderance" and "greater weight" may, without some further explanation, be understood as requiring proof which removes all doubt. After studying the decisions of nearly every court in the country we concluded that attempts to explain universally add to the confusion. Second, an integral part of our present system is a kind of a "converse" burden of proof instruction given by the plaintiff telling the jury that if they believe "from the greater weight of the credible evidence the propositions and issues to be as submitted (in plaintiffs verdict directing instruction)" then the burden of proof has been carried. So on one hand the burden of proof is made to look formidable and on the next page comparatively easy. This probably confuses. Third, Missouri's existing explanation that the "preponderance" of the evidence means "evidence which you think is more worthy of belief than that offered in opposition thereto" is not accurate. A defendant may offer no evidence in opposition to plaintiff's case, thus making plaintiffs evidence more worthy of belief than that offered in opposition. But if the jury does not accept plaintiff's evidence, plaintiff has not carried his burden of proof. Even if defendant offers some evidence, plaintiff's case is not established by simply offering testimony which is more believable than defendant's. The jury may disbelieve both versions, and in such case plaintiff should lose.

Professor Wigmore said: "There is no measure of the weight of evidence (unless the witnesses on evidential facts are counted) other than the *feeling of probability* which it engenders."

With this view in mind the Committee considered an instruction telling the jury that plaintiff carried his burden if the jury believed his story was "more probably true than not true." Again we ran into the problem that these words might be misunderstood as implying a loose standard of proof not intended.

The Committee finally concluded that the word "believe" most accurately expresses that degree of conviction necessary to sustain the burden of proof. We think the term neither implies an unduly heavy burden nor an improperly loose standard. Each verdict directing instruction begins with a statement that the verdict shall be for a named party if the jury believes certain hypothesized facts. To meet the problem of correctly placing the risk of non-persuasion, the jury is instructed that if it is unable to form a belief on a proposition, that proposition fails.

3. *Submitting in the Conjunctive*

Plaintiffs and defendants, when in doubt as to whether their evidence supported each theory of recovery or defense, have often submitted all such theories in the conjunctive. This practice enabled them, in most cases, to avoid reversible error when it developed that one or more of their theories was not supported by the evidence.

The Committee believes that the jury should not be instructed on a theory of recovery or defense not supported by the evidence, and that any such submission, whether in the conjunctive or disjunctive, should be reversible error. A theory of recovery or defense should not be submitted unless it can stand alone. The present practice has been a crutch which has done little but confuse by presenting imaginary issues for the jury's determination.

The Committee recognizes that some instructions will still have several elements which must be submitted in the conjunctive, but these will be in support of a single theory of recovery or defense.

4. *Use of Affirmative Language*

The Committee believes that instructions should tell the jury what they should do rather than what they should not do. Negative language is generally argumentative and does little to educate the jury as to the law. The Committee has departed from this policy in only one case. Wrongful death damage instructions tell the jury that grief is not to be considered. Grief is the most obvious consequence of a loved one's death. It is the pain most easily understood. Plaintiffs grief is apt to be so vivid in the jurors' minds that the limiting words "measured in money" will be overlooked or misinterpreted. For this reason grief is expressly withdrawn as an element of damages in death actions.

Method of Submission

The Committee recommends that the jury be instructed before the trial begins about its duty to determine the facts solely from the evidence, how it shall determine the believability of evidence, and its obligation to give each party fair and impartial consideration without sympathy or prejudice. The Committee believes that it is better to draw the jury's attention to these matters before the trial rather than waiting until after the jurors may have reached a decision.

As each jury may have some neophytes, the recommended pretrial instruction will explain the trial sequence and the effect of objections, rulings and arguments.

The Committee recognizes that some cases may require additional cautionary instructions, but the instruction proposed should suffice in the majority of cases. Some judges decline to give any cautionary instructions, and since their use is discretionary, the refusal is not reversible error. Other judges have sometimes given a handful for each side and unduly complicated the jury's work. The instruction proposed should eliminate both evils.

Other Changes

1. *Unavoidable Accident Instructions*

About 34 years ago the Missouri Supreme Court said: "[t]he word 'accident' in popular acceptation and sometimes in law, may denote an occurrence arising without intent or design or even from the carelessness of man; but in the law of negligence it signifies an event resulting in damage or injury, proceeding from an unknown cause or from a known cause without human agency or without human fault."

Unfortunately the same decision suggested that an unavoidable accident instruction may on occasion be proper. This was all the encouragement needed. Bold counsel, enchanted with the patently misleading language of the unavoidable accident instruction, have periodically tried to make it fit their cases. Their success is best described by a recent Supreme Court decision which said "[O]ur research has disclosed no case [in the past 34 years] in which an accident instruction has been approved, and we find it difficult to conceive of a factual situation in which an accident instruction may properly be given under the rule there set out, notwithstanding the language indicating that such situations could exist."

The Committee heartily agrees with this. In cases where the evidence shows that the cause of the casualty is unknown, thus apparently authorizing an accident instruction, defendants will probably be entitled to directed verdicts.

Unless this instruction is given a formal burial, it will periodically stalk the courtroom contaminating every case it touches. The services should not be delayed.

2. *Sole Cause Instructions*

Sole cause instructions have been used primarily in the field of humanitarian negligence. They have often improperly injected plaintiff's contributory negligence into the case.

The Committee recommends that no verdict instruction be given on behalf of the defendant which hypothesizes that the conduct of one other than defendant was the sole cause of the occurrence. There are three reasons for this recommendation. These are: (1) The negligence of one other than defendant is of no consequence and reference thereto is confusing and misleading. (2) The prescribed converse instruction forms adequately present this defense. (3) Such instructions require the recitation of detailed evidentiary facts. As mentioned above, the Committee recommends that this practice no longer be permitted in any instruction.

MANDATORY USE OF APPROVED INSTRUCTIONS

The Committee proposes that the Supreme Court adopt the recommended rules requiring that when an approved instruction is applicable it must be given to the exclusion of any other instruction on the same subject.

There are hundreds of currently acceptable instructions which use language more favorable to one side or the other than the proposed instructions. If counsel are permitted to "improve" the approved instructions, even within the confines of specific precedents, the value of these instructions will be lost. Each such "improvement" by one counsel will prompt an offsetting "improvement" by his opponent and after a while the court will not be able to find the original with a divining rod.

CONCLUSION

The present system of instructing jurors has met with two major criticisms. First, the instructions are so complex, detailed and argumentative that jurors have trouble understanding them. Second, competent lawyers and judges have too much difficulty determining what instructions are free from error. The Committee believes that the proposed instructions will largely eliminate both criticisms without changing the substantive law, and the Committee unanimously recommends their adoption.

Respectfully, submitted,

SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS

Tom J. Stubbs, Chairman
John S. Divilbiss, Reporter
Eugene E. Andereck, Member

Reed O. Gentry, Member
Horace S. Haseltine, Member
James W. Jeans, Member
William M. Kimberlin, Member
John H. Lashly, Member
John P. Montrey, Member
James E. Reeves, Member
Harry P. Thomson, Jr., Member
O.W. Watkins, Jr., Member

RULE 70. INSTRUCTIONS

70.01. Approval of Instructions—Effective Date—Publication Procedure

Approval of instructions in civil actions will be made by order of this court. The caption of the approved instructions shall state the effective date. The Missouri Bar is directed to publish such approved instructions and notes on use or committee notes as this court authorizes, together with the date upon which the use thereof shall be required.

70.02. Instructions to Juries

(a) Requests for Instructions. Any party may, and a party with the burden of proof on an issue shall, submit written requests for instructions on the law applicable to the issues. Requests shall be submitted prior to an instruction conference or at such time as the court directs. A party need not request a converse instruction until the court has indicated the verdict directing instruction expected to be given. The court may give instructions without requests of counsel. All instructions shall be submitted in writing and shall be given or refused by the court according to the law and the evidence in the case. Each instruction shall be submitted with an original and one copy for the court and one copy for each party. Each copy shall indicate whether it was prepared at the court's direction or by which party it was tendered and shall contain a notation as follows:

"MAI No. ________" or "MAI No. ________ modified" or "Not in MAI" as the case may be.

(b) Form of Instructions. Whenever Missouri Approved Instructions contains an instruction applicable in a particular case that the appropriate party requests or the court decides to submit, such instruction shall be given to the exclusion of any other instructions on the same subject. Where an MAI must be modified to fairly submit the issues in a particular case, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts.

(c) Violation of Rule—Effect. The giving of an instruction in violation of the provisions of this Rule 70.02 shall constitute error, its prejudicial effect to be judicially determined, provided that objection has been timely made pursuant to Rule 70.03.

(d) Converse Instruction—Effect of Requesting. The request of a converse instruction shall not be deemed to waive any objection to the instruction conversed.

(e) Instructions Conference and Record. The court shall hold an instructions conference on the record with counsel to determine the instructions to be given. The court shall inform counsel as to the instructions that are to be given prior to the time they are delivered to the jury. All instructions refused and all instructions given, including a record of who tendered them, shall be kept as a part of a record in the case. Counsel shall make specific objections on the record, out of the hearing of the jury, during the instructions conference. Prior to the instructions conference on the record, the court may conduct informal discussions with counsel regarding jury instructions. The court may correct clerical errors in instructions at any time prior to verdict.

(f) Instructions—How and When Given. After a jury has been sworn to try a case but before opening statements, the court shall read to the jury Missouri Approved Instructions 2.01, which shall be marked and given to the jury along with the other instructions at the close of the case but shall not be reread by the court. The court may give such other preliminary instructions during the trial as will assist the jury in understanding its role or the issues in the case. Agreement is not required for cautionary or withdrawal instructions during the trial. Final instructions in the case, submitting the law applicable to the case, shall be given prior to final arguments. Instructions that are to be given shall be consecutively numbered and all shall be given as instructions of the court. Except where otherwise provided in Missouri Approved Instructions, they shall be given in such order as the court shall deem advisable. The final instructions on the law governing the case shall be read to the jury by the court and provided to the jury in writing.

70.03. Objections to Instructions

Counsel shall make specific objections to instructions considered erroneous. No party may assign as error the giving or failure to give instructions unless that party objects thereto on the record during the instructions conference, stating distinctly the matter objected to and the grounds of the objection. The objections must also be raised in the motion for new trial in accordance with Rule 78.07.

General Principles of MAI Jury Instructions

I. Introduction

Rule 70 is the basis for the Missouri Approved Instructions scheme. It provides the MAI-Civil Instructions Committee the authority to suggest instructions, and the Missouri Supreme Court authority to approve and enforce them. Thus, a thorough review of the Rule, and case law interpreting it, provides the appropriate background to understanding the necessary details of the Missouri Approved Instructions provided in this text. This article will provide detail on how to instruct, object, and determine if an instruction is proper.

II. Rule 70.01

Rule 70.01 provides for the approval of instructions in civil actions by the Missouri Supreme Court. The caption of the approved instructions shall state the effective date. Finally, the rule directs the Missouri Bar to publish approved instructions and notes on use or committee notes as the court authorizes, together with the date upon which the use thereof shall be required.

As a practical matter, MAI jury instructions are published in this book by West. They are also available online via Westlaw and electronically through an e-book, also published by West. However, it is recommended that counsel consult the hardback book when formulating jury instructions for the ease of cross-reference of the instruction, notes on use, committee comments, and annotations. It is also recommended that counsel consult the Missouri Supreme Court website for updates on civil instructions which may not have reached the pocket part of this book due to the issuance date. Please see www.courts.mo.gov/page.jsp?id=589.

III. Rule 70.02 Instructions to Juries

A. Rule 70.02(a). Requests for Instructions

Rule 70.02(a) provides the basic directions to counsel and the court for preparing, submitting, and refusing instructions. Pursuant to Rule 70.02(a), "[a]ny party may, and a party with the burden of proof on an issue shall, submit written requests for instructions on the law applicable to the issues." These requests shall be submitted prior to a jury instruction conference (or at another time as required by the court). While a court has discretion to give instructions without request by a party, a court "is not required to instruct upon any proposition of law arising in a case unless requested." *Sullivan v. KSD/KSD-TV*, 661 S.W.2d 49, 51 (Mo.App. E.D. 1983).

Note, however, that a party seeking a converse instruction need not request such instruction until the court indicates the related verdict director that it expects to give to the jury.

Formatting instructions is important. All instructions are to be submitted in writing and given or refused by the court according to the law and the evidence in the case. Counsel should also prepare alternative instructions if there are anticipated future rulings or evidence that may affect the instructions. Each instruction is to be submitted with an original and one copy for the court and one copy for each party. Each copy must indicate whether it was prepared at the court's direction or by which party it was tendered and shall contain a notation as follows:

"MAI No. ________" or "MAI ________ modified" or
"Not in MAI" as the case may be.

Failure to mark an instruction with its MAI source is error, but not prejudicial, when there is no doubt as to the MAI source. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784, 801–02 (Mo. 1970). The same is true for the failure to mark an instruction as "modified." *Siteman v. Woodward-Clyde & Assocs., Inc.*, 503 S.W.2d 141, 146 (Mo.App. 1973). However, a reviewing court may find prejudice, and thus reversible error, if the source of an instruction is unclear. *See Bower*, 461 S.W.2d at 801–02.

Because Rule 70.02(a) mandates that instructions "shall be given or refused by the court according to the law and the evidence in the case," a court has no discretion to refuse an instruction that is "supported by the evidence and the law and is in proper form." *Marion v. Marcus*, 199 S.W.3d 887, 892 (Mo.App. W.D. 2006). Thus, a party is entitled to an instruction on any theory that is supported by substantial evidence. *Ploch v. Hamai*, 213 S.W.3d 135, 140 (Mo.App. E.D. 2006). This is true "notwithstanding that such evidence may conflict with evidence offered by the opposing party." *Highfill v. Brown*, 340 S.W.2d 656, 661 (Mo.banc 1960).

Smith v. Brown & Williamson Tobacco Corp., 275 S.W.3d 748, 810 (Mo.App. W.D. 2008) demonstrates this substantial evidence requirement. In that case, the Western District found the plaintiff could request a comparative fault instruction opposed by the defendant when the defendant introduced substantial evidence of the plaintiff's fault in contributing to his own damages. In *Smith*, the defendant argued that the trial court erred in submitting a comparative fault instruction requested by the plaintiff because the defendant's amended answer did not raise comparative fault as an affirmative defense. *Id.* at 805. The defendant argued that a plaintiff may not raise the affirmative defense of comparative fault. *Id.* at 806. In affirming the trial court's submission of the comparative fault instruction, the Western District noted that allowing a defendant to withdraw consideration of comparative fault from the jury after introducing evidence of the plaintiff's fault would negate the concept of comparative fault and effectively reinstate the concept of contributory negligence as an absolute bar to recovery. *Id.* at 808 (*citing Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo.App. W.D. 2006)).

B. Rule 70.02(b). Form of Instructions

1. Rule 70.02(b): The Rule's Requirements

When there is an MAI instruction applicable to a case, that MAI instruction must be used, to the exclusion of any other instruction. Rule 70.02(b). Failure to use such MAI instruction is error and presumed prejudicial. *Syn, Inc. v. Beebe*, 200 S.W.3d 122, 128–29 (Mo.App. W.D. 2006).

Rule 70.02(b) recognizes there will not always be an MAI instruction that perfectly fits a particular fact situation in a case. In such a case, the MAI instruction must be modified to fairly submit the issues to the jury. *Shutt v. Chris Kaye Plastics Corp.*, 962 S.W.2d 887, 890 (Mo.banc 1998). Where an MAI must be modified, or where there is no applicable MAI so that an instruction not in MAI must be given, then such modifications or such instructions shall be simple, brief, impartial, free from argument, and shall not submit to the jury or require findings of detailed evidentiary facts. Rule 70.02(b). "The ultimate test is whether the instruction follows the law, and whether the jury can readily understand it." *Ball v. Allied Physicians Grp., L.L.C.*, 548 S.W.3d 373, 387 (Mo.App. E.D. 2018). However, unnecessary modification of an MAI instruction is presumed prejudicial error. *Brannaker v. Transamerican Freight Lines, Inc.*, 428 S.W.2d 524, 537 (Mo. 1968).

In formulating an instruction, it is key that verdict directing instructions be reduced to the "ultimate issues" in dispute. Missouri courts recognize the difficulty of distinguishing between an improper instruction with detailed evidentiary facts and a proper instruction which sets out only the ultimate issues. Because the courts do not have any precise definition to differentiate evidentiary facts from ultimate issues, the propriety of jury instructions that are not guided by MAI forms is determined on a case by case basis. *Duren v. Union Pacific Ry. Co.*, 980 S.W.2d 77, 79–90 (Mo.App. E.D. 1998). Carefully follow the requirements of Rule 70.02 when modifying existing MAI instructions or drafting jury instructions where MAI instructions are not applicable. Only ultimate issues should be given to the jury and all evidentiary details should be left to argument so as to leave the instructions clear and free from confusion. Guidance may be found in other verdict directing instructions on the issue of the types of language considered to be "ultimate facts" by the Committee.

In addition to the instructions, this book also contains Notes on Use and Committee Comments. The Notes on Use to an MAI instruction must be strictly followed, and failure to do so is presumed prejudicial error. *In re Passman's Estate*, 537 S.W.2d 380, 384 (Mo.banc 1976); *Criswell v. Short*, 70 S.W.3d 592, 594 (Mo.App. S.D. 2002). Failure to follow the Committee Comments to an MAI instruction is not presumed prejudicial, but still "tends to [be] prejudicial error." *Passman's Estate*, 537 S.W.2d at 384.

2. Rule 70.02(b): Special Issues

The basic concept of verdict directing under MAI philosophy is to direct the jury to a legal conclusion on the determination of the existence or nonexistence of certain ultimate facts submitted in the verdict-directing instruction. However, there are special issues that may arise when instructing a jury. Specific common issues are detailed below.

a. Conflict with Substantive Law

MAI instructions merely reflect the law; they are not, themselves, substantive law. *Nooney Krombach Co. v. Blue Cross and Blue Shield of Mo.*, 929 S.W.2d 888, 894 (Mo.App. E.D. 1996). When an MAI instruction conflicts with the substantive law, the substantive law governs, and the conflicting MAI instruction should not be given. *Koon*, 539 S.W.3d 752, 769 (Mo.App. E.D. 2017); *Hervey v. Missouri Dept. of Corr.*, 379 S.W.3d 156, 159 (Mo.banc 2012). In *Hervey*, the Missouri Supreme Court found reversible error in the submission of a verdict director that did not require the jury to find an essential element of the claim; i.e., the factual existence of plaintiff's claimed disability, thereby relieving her of the burden of proving an essential element of the Missouri Human Rights Act claim. *Id.* at 163. *Hervey* demonstrates that an MAI must be modified where the substantive law has changed and MAI has yet to conform. A party requesting a non-

MAI instruction on this basis has the burden of showing the MAI instruction misstates the substantive law. *Topper v. Midwest Div., Inc.*, 306 S.W.3d 117, 131 (Mo.App. W.D. 2010).

Regardless of whether MAI or non-MAI, the instructions must submit the essential elements of the plaintiff's case to the jury, by requiring the jury to find all disputed ultimate facts.[1] *Pool v. Farm Bureau Town & Country Ins. Co. of Mo.*, 311 S.W.3d 895, 903–04 (Mo.App. S.D. 2010). Ultimate facts are those facts "essential to the plaintiff's claim," i.e., the facts "necessary to sustain the verdict." *Agri Process Innovations, Inc. v. Envirotrol, Inc.*, 338 S.W.3d 381, 387 (Mo.App. W.D. 2011).

b. Roving Commission

Failure to require the jury to find all disputed ultimate facts results in a "roving commission." "A 'roving commission' occurs when an instruction assumes a disputed fact or submits an abstract legal question that allows the jury 'to roam freely though the evidence and choose any facts which suited its fancy or its perception of logic' to impose liability." *Seitz v. Lemay Bank and Trust Co.*, 959 S.W.2d 458, 463 (Mo.banc 1998). A roving commission is presumed prejudicial error. *Grindstaff v. Tygett*, 655 S.W.2d 70, 74 (Mo.App. E.D. 1983).

For example, in *Tisch v. DST Systems, Inc.*, 368 S.W.3d 245 (Mo.App. W.D. 2012), the court held that the use of open-ended language in a jury instruction resulted in a roving commission. In *Tisch*, the plaintiff brought claims for gender discrimination, age discrimination, and retaliation against his employer. The court held that the plaintiff's proffered verdict-directing instruction created a roving commission because it used the word "including" to impermissibly enlarge the scope of conduct for the jury's consideration beyond that which was actionable. *Id.* at 256. For further examples of roving commissions, see *Jones v. Rash*, 306 S.W.2d 488 (Mo. 1957); *McIntyre v. Whited*, 440 S.W.2d 449 (Mo.App. E.D. 1994); *Mast v. Surgical Services of Sedalia, L.L.C.*, 107 S.W.3d 360 (Mo.App. W.D. 2003).

To avoid a roving commission, the party submitting an instruction should be sure to submit ultimate fact issues accurately and concisely. Utilizing the language "in the respect submitted in paragraph ______" in MAI verdict directors will help avoid imposing a roving commission. *Gousetis v. Bange*, 425 S.W.2d 91 (Mo. 1968).

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[1] Evidentiary facts, in contrast to ultimate facts, should not be submitted to the jury. *Quinn v. Lenau*, 996 S.W.2d 564, 570 (Mo.App. E.D. 1999). Undisputed elements or ultimate facts also should not be submitted to the jury. *Pool*, 311 S.W.3d at 904.

c. Support for Instruction

Any instruction submitted to the jury must be supported by substantial evidence. *Wieland v. Owner-Operator Servs., Inc.*, 540 S.W.3d 845, 849–50 (Mo.banc 2018). When an instruction is in the disjunctive form, each disjunctive alternative must be supported by substantial evidence. *Ross-Paige v. Saint Louis Metro. Police Dep't*, 492 S.W.3d 164, 172 (Mo.banc 2016). A disjunctive instruction is prejudicial when substantial evidence does not support each disjunctive alternative because "there is no way of discerning which theory the jury chose." *Kader v. Bd. Of Regents of Harris-Stowe State Univ.*, 565 S.W.3d 182, 186-87 (Mo.banc 2019) (holding that when disjunctive verdict directing instructions were not each supported by substantial evidence, the instructions were prejudicial and warranted reversal).

"Substantial evidence is evidence which, if true, is probative of the issues and from which the jury can decide the case." *Id.* An instruction not supported by substantial evidence is misleading and confusing, and thus erroneous. *Sheinbein v. First Boston Corp.*, 670 S.W.2d 872, 878 (Mo.App. E.D. 1984). If an instruction is not supported by substantial evidence, the opposing party must raise a submissibility-of-the-instruction challenge, which compares the evidence to the language of the instruction itself. *Wieland*, 540 S.W.3d at 850 n.3. This challenge must be raised during the instructions conference and, if necessary, renewed in a motion for new trial.[2] *Id.*

Any instruction submitted must also be within the scope of the pleadings. *Hartford Accident & Indem. Co. v. List*, 424 S.W.2d 761, 768 (Mo.App. 1968). A jury instruction is prejudicial if it directs recovery on a different theory than on that pleaded and proved. See, e.g., *In re Estate of Schwartze*, 998 S.W.2d 596, 599 (Mo.App. E.D. 1999). However, an instruction is not required to strictly follow the language of the pleadings; it is sufficient that the instruction "falls within the fair implication or 'within the purview' " of the pleadings. *Schiles v. Schaefer*, 710 S.W.2d 254, 263 (Mo.App. E.D. 1986). Additionally, a party is entitled to an instruction on an issue that, although not within the scope of the pleadings, has been tried by implied consent of the parties. *Holtmeier v. Dayani*, 862 S.W.2d 391, 400 (Mo.App. E.D. 1993).

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[2] A submissibility-of-the-instruction challenge is distinct from a submissibility-of-the-claim challenge, the latter of which is appropriate when substantial evidence does not support the plaintiff's claim as provided by the substantive law. *Id.* A submissibility-of-the-claim challenge thus compares the evidence to the substantive law of the plaintiff's theory of recovery, rather than to the language of the instruction, and must be raised in a motion for directed verdict and, if necessary, renewed in a motion for judgment notwithstanding the verdict. *Id.* Further, both a submissibility-of-the-instruction challenge and a submissibility-of-the-claim challenge are distinct from a challenge that the instruction misstates the substantive law. *Id.* at 851.

d. Not-in-MAI Definitional Instructions

The topic of definitional instructions arises often. If a term used in an instruction has an MAI definition, the definition must be given to the jury. *Rice v. Bol*, 116 S.W.3d 599, 609–10 (Mo.App. W.D. 2003). The trickier situation is where a term does not have an MAI definition and trial counsel believes it should be defined. If the term is found in an existing MAI instruction, but is not defined by MAI, be wary of offering a definition. An instruction should not provide definitions for "ordinary words used in their usual or conventional sense." *In re Van Orden*, 271 S.W.3d 579, 586 (Mo.banc 2008). For instance, in a case involving an alleged battery by police officers and the officers' claim that they used only reasonable force, the Western District of the Court of Appeals wrote:

> MAI 23.02 does not contain a definition of reasonably necessary or reasonable force. "When MAI does not require definition of the terms, definition is not required and may be an impermissible deviation." We, therefore, do not discern that the circuit court abused its discretion in refusing to define reasonable force.

Collins v. Hertenstein, 90 S.W.3d 87, 108 (Mo.App. W.D. 2002).

In product liability cases MAI 25.04's term "defective condition unreasonably dangerous" remains undefined, although this has been the subject of debate. See *Nesselrode v. Executive Beechcraft, Inc.*, 707 S.W.2d 371 (Mo. 1986); *Newman v. Ford Motor Co.*, 975 S.W.2d 147, 154 (Mo. 1998) (definition of "unreasonable danger" properly rejected; "[n]othing prevents the litigants from arguing that the utility of a design outweighs its risks, or that consumer expectations were violated, or any other theory of unreasonable dangerousness supported by the evidence").

An instruction should define technical legal terms of art that are used. *In re Van Orden*, 271 S.W.3d 579, 586 (Mo.banc 2008). While no case has directly held that definitions of technical scientific, medical, or engineering terms are improper, caution should be exercised as such definitions may be more properly the subject of evidence and definitional instructions on those subjects could constitute prohibited evidentiary detail. If a claim is based on a statutory violation, it is generally sufficient to couch the related instruction "substantially in the language of the statute unless the statutory language requires construction." *Osborn v. Orthopaedic Ass'n of Kansas City, Inc.*, 844 S.W.2d 36, 38 (Mo.App. W.D. 1992).

In *In re Van Orden*, 271 S.W.3d 579, 586 (Mo.banc 2008), the Supreme Court held that the burden of proof standard of "clear and convincing evidence" did not require a specific definitional instruction. The case involved a sexually violent predator's appeal of his civil commitment. *Id.* at 581. On appeal, he argued the trial court abused its discretion by rejecting his proposed definitional instruction for clear and convincing evidence. *Id.* at 586. Rejecting the plaintiff's argument, the Supreme Court held that the phrase "clear and convincing evidence" needed no further definition because the words were commonly used and readily understandable, and the phrase provided the jury with sufficient instruction on the applicable burden of proof. *Id.* The Court noted that the additional phrases offered by the plaintiff would only increase the possibility of confusion and complicate the instructions. *Id.*

In *Hale v Burlington Northern & Santa Fe Railway Company*, 524 S.W.3d 603 (Mo.App. S.D. 2017), the Southern District explained in detail why an instruction attempting to advise a jury of a "rule of law" was inappropriate under the MAI approach to instructing a jury. This case provides an excellent discussion of the MAI philosophy for instructions and points out the dangers of proposing jury instructions that depart from this philosophy.

Generally speaking, "[t]he decision to submit a definitional instruction is a matter within the sound discretion of the trial court ...." *DeWitt v. American Family Mut. Ins. Co.*, 667 S.W.2d 700, 711 (Mo. 1984). Defining a term that doesn't need a definition can introduce confusion into the case, and possibly lead to error. See *State Farm Mut. Auto. Ins. Co. v. DeCaigney*, 927 S.W.2d 907, 910 (Mo.App. W.D. 1996) (term "living with" in an insurance policy did not need to be defined).

e. Comparative Fault

The doctrine of pure comparative fault has been adopted in Missouri. *Gustafson v. Benda*, 661 S.W.2d 11 (Mo.banc 1983). However, this does not mean comparative fault will be submitted in all cases. The defendant still maintains the burden of pleading and proving fault on the part of the plaintiff. An instruction submitting the comparative fault of the plaintiff must be supported by substantial evidence or it will be erroneous. *Roy v. Mo.*

Pac. R.R. Co., 43 S.W.3d 351 (Mo.App. W.D. 2001).

A comparative fault instruction may be proper when a plaintiff asserts liability according to the doctrine of strict liability for product defect. *Egelhoff v. Holt*, 875 S.W.2d 543, 547 (Mo.banc 1994). Care should be taken when drafting a comparative fault instruction relying on the relevant product liability statute, §§ 537.760-537.765, RSMo. Any instruction that simply quotes the statutory language as the basis for a submission of comparative fault likely does not specify any act of the plaintiff on which to base a finding of comparative negligence and will be erroneous.

f. Multiple Theories/Multiple Defendants

In a comparative fault case with multiple defendants, the defendants can only have one, jointly submitted comparative fault instruction—it would be error to give two or more. *Egelhoff*, 875 S.W.2d 543.

A defendant may rely on multiple defenses, submitted in the alternative in a single instruction, even if they are inconsistent. *Michael v. Kowalski*, 813 S.W.2d 6 (Mo.App. W.D. 1991). Similarly, a plaintiff is not required to elect a remedy or theory before submission of the case to a jury. Rather, the plaintiff may submit multiple theories and then determine which verdict it will recover on to avoid double recovery for a single event. *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346 (Mo.App. E.D. 1993); *Cook v. Holcomb*, 854 S.W.2d 78 (Mo.App. E.D. 1993).

When there are multiple causes of damages alleged, MAI 19.01 permits modification of verdict directing instructions by substituting language to indicate there was another potential cause of damage. This modification is permitted when the potential other cause is plaintiff's own fault or the fault of a non-party. MAI 19.01 is permitted in most any type of case (death cases, product liability, premises liability, etc.). MAI 19.01 expressly provides that this substitute language may be used "at plaintiff's option." However, see MAI Chapter 38 on claims arising under the Missouri Human Rights Act for situations when MAI 19.01 may not be appropriate.

When it is appropriate to modify verdict-directing instructions pursuant to 19.01, it is also necessary to modify MAI 4.01 to reflect the modified language. Converse instructions, if submitted, must also be modified to conform with this language. Finally, any 19.01 modification must be consistent in the verdict directing instruction and the comparative fault submission. *Bean v. Superior Bowen Asphalt Co., LLC*, 340 S.W.3d 275 (Mo.App. W.D. 2011).

C. Rule 70.02(c). Violation of Rule—Effect

As provided by Rule 70.02(c), an instruction that violates Rule 70.02 is automatically considered error, leaving only the prejudicial effect of such error to be determined. An error is prejudicial, or reversible, when it materially affects the merits of the case. *Syn, Inc. v. Beebe*, 200 S.W.3d 122, 128–29 (Mo.App. W.D. 2006). Instructions that mislead and confuse the jury are prejudicial. *Hall v. Cooper*, 691 S.W.2d 507, 510 (Mo.App. W.D. 1985). In determining whether an instructional error is prejudicial, a reviewing court considers the entire set of instructions together. *Buckallew v. McGoldrick*, 908 S.W.2d 704, 709–10 (Mo.App. W.D. 1995). "Typographical or inadvertent errors are not necessarily prejudicial when a literate juror could conclude what the instructions were intended to communicate." *Id.* at 710.

When an instructional error is presumed prejudicial, e.g., when an applicable MAI instruction is unnecessarily modified, the proponent of the erroneous instruction has the burden of demonstrating the error is not prejudicial. *Syn Inc.*, 200 S.W.3d at 129. For example, in *Johnson v Auto Handling Corporation*, 523 S.W.3d 452 (Mo.banc. 2017), the Missouri Supreme Court noted that the burden is on the proponent of a not-in-MAI instruction "to show that the error in submitting that instruction was not prejudicial."

D. Rule 70.02(d). Converse Instruction—Effect of Requesting

Rule 70.02(d) states in full: "The request of a converse instruction shall not be deemed to waive any objection to the instruction conversed." That is, Rule 70.02(d) provides a party may both request a converse instruction and challenge the instruction being conversed as erroneous. For each verdict-directing instruction directed to a party, that party is allowed only one corresponding converse instruction. *Hiers v. Lemley*, 834 S.W.2d 729, 734 (Mo.banc 1992). Violating this one-converse rule is reversible error. *Higgins v. Gosney*, 435 S.W.2d 653, 659 (Mo. 1968). There are two types of authorized converse instructions: true converse instructions and affirmative converse instructions. *Hiers*, 834 S.W.2d at 734.

A true converse instruction "simply mirrors the language of one or more elements of the verdict director." *Howard Constr. Co. v. Teddy Woods Constr. Co.*, 817 S.W.2d 556, 561 (Mo.App. W.D. 1991). A party who does not have the burden of proof on an issue is entitled to a true converse instruction on "any one or more of the essential elements of his opponent's theory of recovery or affirmative defense." *Fontana v. Davis*, 382 S.W.2d 835, 839 (Mo.App. 1964). If a party chooses to converse an element that the verdict-directing instruction has submitted in the disjunctive, the true converse instruction must address all disjunctive alternatives. *Howard Constr. Co.*, 817 S.W.2d at 561. A true converse instruction begins, "Your verdict must be for the defendant unless you believe," and is followed by one or more of the elements in the verdict-directing instruction. *Hiers*, 834 S.W.2d at 734.

An affirmative converse instruction presents a hypothetical ultimate issue which, if true, would defeat the other party's claim. *Id.* An affirmative converse instruction should not be used to submit the same issue that was submitted in the verdict-directing instruction. *Howard Constr. Co.*, 817 S.W.2d at 562. Rather, an affirmative converse should be used only when the verdict-directing instruction assumes as true, or omits, a disputed ultimate fact or element. *Hiers*, 834 S.W.2d at 735. An affirmative converse instruction begins, "Your verdict must be for the defendant if you believe," followed by the hypothetical that would defeat the other party's claim. *Id.* at 734. Unlike a true converse instruction, an affirmative converse instruction requires independent evidence for support. *Id.*

E. Rule 70.02(e). Instruction Conference, Objections, and Record

The court shall hold an instruction conference on the record with counsel to determine the instructions to be given. The purpose of this conference is to allow the court to inform counsel as to the instructions it will provide to the jury. This rule also requires the court to keep as a record all instructions refused and given, including a record of who tendered them.

Effective January 1, 2018, Rule 70.02(e) was amended. As amended, the rule allows the trial court to conduct informal discussions on the instructions with counsel before the instruction conference. The instruction conference must be on the record. Counsel is required to make specific objections during the instruction conference. The court may correct clerical errors at any time prior to the verdict.

The fact that an instruction conference is held on the record is key to maintaining a proper record of the case. During this conference, a party must raise any objections to instructional error. Failure to do so renders an objection untimely. Timely objection to an instruction is "required as a condition precedent to appellate review in order to afford the trial court an opportunity to correct any mistakes immediately and inexpensively without risking the delay and expense of an appeal and a retrial." *Howard v. City of Kansas City*, 332 S.W.3d 772, 790 (Mo.banc 2011). An objection to an instruction must not only be timely, but also specific rather than general. A general objection preserves nothing for appellate review because it "does not allow the trial court to make an informed ruling as to the validity of the objection." *Sparkman v. Columbia Mut. Ins. Co.*, 271 S.W.3d 619, 624 (Mo.App. S.D. 2008). Further, a party's objection to an instruction must be clearly reflected in the record; otherwise, a claim of error based on the alleged objection is unreviewable by an appellate court. *Holt v. Rabun*, 519 S.W.2d 561, 562 (Mo.App. 1975). Finally, any objection to instructions must also be raised in a motion for new trial in accordance with Rule 78.07. *See* Rule 70.03.

F. Rule 70.02(f). Instructions—How and When Given

Rule 70.02(f) governs how and when a jury hears instructions. First, after a jury has been sworn to try a case but before opening statements, the court shall read to the jury Missouri Approved Instructions 2.01, which shall be marked and given to the jury along with the other instructions at the close of the case but shall not be reread by the court. MAI 2.01 is an explanatory instruction that is mandatory for all civil jury cases. Unnecessary deviation from MAI 2.01 is presumed prejudicial error. *Duebelbeis v. Dohack*, 615 S.W.2d 488, 489 (Mo.App. E.D. 1981); *Chapman v. Bradley*, 478 S.W.2d 873, 873 (Mo.App. 1972). As with other instructional error, a party must object to an erroneous giving of MAI 2.01 to preserve the error for appellate review. *Dorsey v. Robinson*, 600 S.W.2d 59, 60 (Mo.App. E.D. 1980). However, unlike other instructional error, a party may need to object to an erroneous giving of MAI 2.01 at the first available opportunity, rather than wait for the instructions conference. *See id.*

Pursuant to Rule 70.02(f), the court may give such other preliminary instructions during the trial as will assist the jury in understanding its role or the issues in the case. Agreement is not required for cautionary or withdrawal instructions during the trial. Rule 70.02(f) was amended (effective January 1, 2018) to remove the requirement that there be "agreement of all parties" for the court to give other preliminary instructions during the trial.

MAI E1.00 and E1.01 contain a discussion of the use of an early case summary which is not a mandatory instruction, but is discretionary. Such a summary may be given before jury selection. MAI E1.00C. The purpose is to assist the jury in understanding the voir dire process in the context of a particular case and to assist the jury in understanding why certain questions are being asked by the attorneys. Research has demonstrated that such early explanations to members of a jury panel will enhance jury understanding of the case and their roles in achieving justice through the jury process. MAI E1.00A. An early case summary is not intended to replace or shorten voir dire.

MAI includes general instructions that may be given before jury selection (MAI 2.00(A)) and/or at a break or adjournment during trial (MAI 2.00(B)). Neither MAI 2.00(A) nor 2.00(B) are mandatory. Rather, their use is discretionary. The trial judge has discretion to determine the scope or frequency of directions or admonitions like that provided in MAI 2.00(B). Similarly, some instructions are prohibited. A non-exhaustive list and explanation appears in MAI 1.00 and MAI 1.01–1.06.

Final instructions in the case, submitting the law applicable to the case, shall be given prior to final arguments and a written copy is provided to the jury. Juror copies of instructions are to be "clean" originals without notations of source or party by which it is tendered. Instructions that are to be given shall be consecutively numbered and all shall be given as "instructions of the court." That is, instructions are provided on behalf of the court, not as instructions of a particular party. Submitting an instruction to the jury that is labeled as an instruction of a particular party would be error, with prejudice to be judicially determined. *See Washburn v. Grundy Elec. Coop.*, 804 S.W.2d 424, 430 (Mo.App. W.D. 1991).

IV. Rule 70.03

Rule 70.03 outlines the procedure to make objections to instructions. It requires counsel to "make specific objections to instructions considered erroneous." Further, "[n]o party may assign as error the giving or failure to give instructions unless that party objects thereto on the record during the instructions conference, stating distinctly the matter objected to and the grounds of the objection." Rule 70.03. Effective January 1, 2018, Rule 70.03 was amended to require objections be made during the instructions conference. Previously, Rule 70.03 allowed objections to be made "before the jury retires to consider its verdict."

As discussed in the context of Rule 70.02(e), to preserve claims of instructional error for appellate review, a party must raise objections to instructional error during the instructions conference, such objections must be specific, and such objections must be reflected in the record. Additionally, preservation for appellate review requires objections to be renewed in a motion for new trial in accordance with Rule 78.07. *Howard v. City of Kansas City*, 332 S.W.3d 772, 790 (Mo.banc 2011). If a party fails to preserve a claim of instructional error, appellate review is limited to "plain error" review under Rule 84.13. *Senu-Oke v. Modern Moving Sys., Inc.*, 978 S.W.2d 426, 431 (Mo.App. E.D. 1998).

Further, a court has no duty to submit a correct instruction in place of a party's requested erroneous instruction. *Cluck v. Union Pac. R. Co.*, 367 S.W.3d 25, 33 (Mo.banc 2012). Thus, under the "invited error" doctrine, a party may not claim error on appeal for an instruction given at that party's request. *Pinkstaff v. Hill*, 827 S.W.2d 747, 751 (Mo.App. W.D. 1992). Nor may a party claim error on appeal for the failure to give an instruction not requested. *Sullivan v. KSD/KSD-TV*, 661 S.W.2d 49, 51 (Mo.App. E.D. 1983).

HOW TO USE THIS BOOK

Committee Comment (2012 Revision)

FIRST, KNOW RULES OF PROCEDURE 70 AND 71

Before you can use this book you must understand Civil Rule 70 which prescribes procedure for instructing civil juries and Rule 71 which limits the verdicts which may be returned by civil juries. The approved instructions and forms of verdict in this book are drafted according to and are extensions of that procedural law.

It should be obvious that if you don't know the procedural law which spawns the approved instructions, you will not use this book well and accurately.

After more than a decade of reversals for jury instruction errors at an intolerable rate and at the urging of the bar, the supreme court created this committee charged to study civil jury instructions and to report to and advise the court from time to time. The committee's 1963 report was adopted by the court and resulted in Rule 70 which requires the use of standardized civil jury instructions called MAI.

The committee's 1963 report is included in this book for its help in illustrating the more terse language of Rule 70. The report promulgated four practice standards for drafting an instruction in the mandatory form of an MAI. To those standards, two caveats have been added:

(1) Is it a correct statement of law?
(2) Is it a complete statement?
(3) Is it concise?
(4) Is it stated in language the average juror can understand?

CAVEATS:

(5) Do not attempt to make your not-in-MAI instruction argue your position. Civil Rule 70.02(b).
(6) Do not include abstract statements of law. Your verdict directing instruction must follow the form of MAI which directs the jury to make a certain finding required by unstated law if the propositions of fact are believed.

OLD PRINCIPLES OF JURY INSTRUCTION ARE STILL IN FORCE

MAI has changed only the method of instruction and not the principles. An instruction must be a correct statement of the law. That is an old principle which remains unchanged. The statement of law is made differently than it was before. For illustration, MAI 17.01 instructs on the law which requires traffic lights to be obeyed, "Your verdict must be for . . . if you believe: First defendant violated the traffic signal, and . . . ." Before MAI, the court would have said by instruction, "you are instructed that under the law the defendant had a duty to observe and obey the traffic control lights at the intersection of . . . ." The rule of law submitted remains the same; its submission is made differently.

All of the old principles of jury instruction (unless expressly changed by a case decision, rule of procedure or statute) remain the same. It remains error to submit a theory which is not pled or supported by substantial evidence. Each of the instructions remains as a part of the single charge. It is still error to assume a disputed fact. Principles relating to "invited error" and "common error" are still applicable. The principles of instruction have not been changed. It is the methods of applying those principles of instruction which have been changed by the adoption of MAI.

NOTES ON USE, COMMITTEE COMMENTS, AND ANNOTATIONS

The Notes on Use following each instruction in this book dictate the circumstances under which the instruction may be used. These must be followed.

The Committee Comments are intended to show the source of the approved instructions and to aid lawyers in finding some of the authorities relevant to the instruction.

The annotations are brief synopses of cases dealing with the specific instruction in question to assist your research. Inasmuch as many of the MAIs have been revised, be certain the case cited is applicable to the existing instruction.

KNOW THE APPLICABLE SUBSTANTIVE LAW

Verdict directing MAIs hypothesize propositions of fact to be found or rejected by the jury. They are the ultimate facts which support the submitted claim or defense. The theory of claim or defense is based on the applicable law.

Since the trial court will decide the law by its selection of instructions, it is essential for you, the lawyer, to research and be familiar with the law. It is your task to prepare the instructions correctly. If the correct instruction is not prepared, you have failed your task. You cannot prepare the correct instructions unless you know the applicable law.

SELECT THE APPROPRIATE INSTRUCTION

When you know the law which applies to your case or defense, you will find it relatively simple in most cases to select the appropriate verdict directing instruction. If your claim is for work and labor and you can prove no express contract, your theory may be quantum meruit. It is obvious that you should look for a quantum meruit form and bypass any express contract instruction.

When you are making your selections, you are applying the applicable law. When the trial judge decides to give or to refuse instructions, the court is deciding which is applicable law. Know your law.

MODIFICATIONS AND WHEN NO APPLICABLE INSTRUCTION IS IN THE BOOK

You may have the ability to improve an instruction in MAI but you do not have the authority to do it. Do not do it. The use of a provided MAI is mandatory. If you think the change of a word or phrase will make it a better instruction, do not do it. You are falling into error if you do.

Changes in the law may render an applicable MAI instruction a misstatement of then current law. If so, counsel and the trial judge should revise or rewrite the MAI instruction to make it consistent with then current law. A thorough record, including citations to the new law, should be included to alert appellate courts to the reason for the deviation from an apparently applicable MAI instruction.

A modification which is necessary to make a provided MAI fit the facts of your case, however, is not only permissible but is required.

If it is plain from the pleadings, trial or an express admission that an essential ultimate fact element is not in issue, the applicable MAI may be modified by deletion of that element.

By the same token, it may be necessary to modify an instruction to submit an issue which is in dispute in your case but which usually is not disputed and thus is not submitted by the approved MAI. For example, none of the motor vehicle verdict directors hypothesize that the defendant was driving the vehicle at the time of the collision because this matter usually is not in dispute. However, in a hit-and-run situation, where defendant denies he was driving the vehicle that hit plaintiff, the verdict director must be modified to include the fact issue.

When you are sure that an approved instruction does not fit your case precisely but one or more instructions are close to it, modifications must be made. Occasionally the modification will be made by incorporating part of another MAI. For instance, when the provided MAI hypothesizes that the defendant's negligence directly resulted in damage to the plaintiff, this would not be a sufficiently clear statement in a consortium case where the defendant's negligence caused injury to plaintiffs spouse, which in turn damaged plaintiff. A modification is required to clarify, to bridge the reasoning gap between defendant's negligence and the damage to plaintiff who might not even have been present at the casualty. MAI 31.04 is the verdict directing instruction to use to submit this additional element of damage to the spouse of the injured plaintiff.

If you think an MAI should be modified to submit another issue of fact, be very careful to ascertain that the issue you propose to add is actually in issue and that it is an essential ultimate fact. If it is not, you run afoul of the Civil Rule 70.02 requirements for brevity and freedom from submission of detailed evidentiary fact.

When there is no MAI which is usable, even with modification, then you must undertake for yourself the task which is routinely performed by the MAI committee. You must research the law, determine the essential, ultimate facts which are in dispute and draft your own instruction, following the principles of the committee's 1963 original report to the supreme court and Civil Rule 70.02. Your not-in-MAI drafting is required to be in the form of the MAIs.

DEFINITIONS, MANDATORY OR PERMISSIBLE

In practice, some confusion has arisen concerning definitions. Included in this book are indications in the Notes on Use for each instruction when it contains a term or phrase which must be defined. The definitions are necessary to interpret a legal term for a lay jury and they are utilized in accord with standard No. 4 of the 1963 report to the Supreme Court:

(4) Is it stated in language the average juror can understand?

Thus, when it is indicated that a term or phrase must be defined, it is error to omit the provided definition.

If you use a term not having an MAI definition which you believe should be defined, prepare a definition and tender it to the trial judge. Whether the judge gives a definition instruction which is not mandatory is largely discretionary. Giving a definition of an MAI instruction term obtained from an approved instruction is a modification of the instruction and is subject to all of the standards of modification.

OTHER MANDATORY INSTRUCTIONS

There are mandatory instructions which must be given in every case. In addition each case will dictate on its own facts that there are additional mandatory instructions required in that particular case. Mandatory instructions are indicated throughout this book. A detailed discussion of mandatory instructions is included in the reprinted article included in this book, “Why and How To Instruct a Jury.”

CONVERSE INSTRUCTIONS

In accord with Civil Rule 70.02(d), converse instructions are provided. Before you submit converse instructions you should read and understand MAI 33.01 CONVERSE INSTRUCTIONS—GENERAL COMMENT.

AFFIRMATIVE DEFENSES

If a complete affirmative defense, such as a release, is submitted, the verdict directing instruction must be modified by the addition of an affirmative defense “tail” which references the affirmative defense instruction. See the bracketed “tail” to MAI 17.01 and other verdict directing instructions. Such a “tail” should also be used if there is a defense to an affirmative defense. See MAI 32.21 and 32.22.

USE OF TERMS PLAINTIFF AND DEFENDANT; COUNTERCLAIMS, CROSSCLAIMS AND OTHER CLAIMS

To keep the Missouri Approved Instructions as simple as possible, some were originally prepared in terms of a single male plaintiff and a single male defendant. Although, the instructions in this edition have been modified to be gender neutral pronoun modifications may still be needed for multiple parties and corporations. In addition, in cases which submit more than one claim [whether several claims by plaintiffs, counterclaims, crossclaims or third party claims] it may be necessary to use a short identifying term, "John Brown's claim for damages," "Mary Brown's claim for loss of services," and the like.

The first two editions of MAI used the formalistic identifying phrases, "for plaintiff on Count I," "for plaintiff on Count H." Those are discarded in favor of the more helpful, short descriptions of the nature of the claim being decided.

The Notes on Use and Committee Comment to each instruction are instructive in this regard.

ROLE OF THE TRIAL JUDGE

The trial judge has the duty of deciding the issues of law in every case. In jury instruction, the decision to give or refuse any instruction is a decision of an issue of law.

Therefore, each instruction given or refused reflects the trial judge's performance and it is a judicial duty to give a complete charge to the jury. Civil Rule 70.02 reflects that nondelegable duty in its reference to identifying instructions prepared "at the court's direction." That is a very real and vital duty in the administration of justice and no trial judge can abdicate judicial responsibilities to the discretion of the trial lawyers who prepare the instructions. No judge should fail in this duty upon the premise that if the lawyers want to create error they are free to do so.

Some of the instructions and the substantive law they reflect impose important duties on the trial judge in writing the judgment after return and acceptance of the jury's verdicts. Notable in this regard are the apportionment of fault judgments. The trial judge may call freely upon the assistance of the trial lawyers, but ultimately it is the duty of the judge and the judge may not escape it.

The tasks of the trial judge are eased somewhat in the verdict forms now employed. A great deal of the chance of scrivener error in the jury room is eliminated by having the verdict forms prepared in advance for the jury so that the jury now fills in the blanks. The requirement of a separate prepared verdict form for each packaged submission of a claim also helps eliminate the overlooked claim and the failure of the verdict of the jury to decide the whole case.

As is noted above, the method for giving the jury its instructions on the law is subtle. It is in the form of a direction of legal result from stated findings. The trial court does not tell the jury why such a result is dictated. In pre-MAI jury instructions, the legal explanations for the results were freely sprinkled throughout instructions by argumentative statements of rules of law and pure argument, "even though," "the mere fact," "you are instructed the defendant had a duty," and so on *ad infinitum*. The elimination of such statements in the court's instructions to be read to the jury promotes fairness to all parties. The duty of advocacy has been returned to the argument of the trial lawyers.

Each trial judge should recognize the CHANGE and adjust views and rulings on jury arguments accordingly. Lawyers must leave their argument of the reasons for actions and results in their place, in the jury arguments and not in the instructions. Thus, the lawyer's argumentative statements that under the law my client had a right to believe or a right to rely or a right to proceed or any of the multitude of rights or duties are entirely proper so long as he does not misstate the law. It now is in the jury arguments that the jury gets its only lucid insight into why it is given any particular instruction.

Because argument of law is eliminated from the instructions and is argued in summation, the trial judge is required to be alert and judgmental during the entire course of jury arguments for misstatements of the law. The catch-all observation that the jury will remember the instructions and evidence will not suffice if the argument includes a misstatement of law. The corollary is that an erroneous denial of the trial lawyer's right to argue an applicable rule of law may also be a denial of a fair trial.

In short, MAI has taken advocacy out of the instructions and returned it to the trial lawyers. The case is no longer fully argued when the instructions are read. It is argued in the jury arguments and the trial judge's function of deciding the issues of law continues throughout the arguments.

No system of jury instruction will work without the active supervising control of the most important individual in a jury trial, an alert trial judge, and that is particularly true in the use of MAI.

WHY AND HOW TO INSTRUCT A JURY

By John C. Milholland[1]

All editions of MAI have included "How to Use This Book", a section written for trial judges and lawyers who are experienced in jury instructions. But, believing also that an "instruction book" should be as helpful as possible, committee assignment was made to draft "Why and How to Instruct a Jury", an article in the nature of a primer or guide for instructing civil juries, originally published both in the Journal of the Missouri Bar and in the Third Edition of the MAI. It was not intended to be legal authority to support adversary positions. It was intended to be a practical teaching tool, to be informative. This revision of that primer carries no committee stamp of approval and it does not carry the endorsement of the Supreme Court of Missouri.

Landmarks. Prior to 1930, circuit judges were not required to instruct civil juries in writing. That procedure was changed by the decision of *Dorman v. East St. Louis Ry. Co.*, 75 S.W.2d 854 (Mo.1934) which imposed the duty on trial lawyers to prepare and tender, in writing, all instructions they want the jury to be given.

In the practice which developed after 1934, when an appeal presented an issue of the validity of a questionable instruction, the instruction either was held to be error or came to carry the appellate court stamp of an "approved" instruction. A pernicious practice of drafting marginally correct argumentative instructions to act as "judicial advocates" for one side or the other but still be held to be "approved" by an appellate court led to the creation of the procedure of civil jury instructions by the MAI.

To coerce the bench and bar into using MAI to the exclusion of other instructions, the decision of *Brown v. St. Louis Public Service Co.*, 421 S.W.2d 255 (Mo.banc 1967) construed Rule 70.01 to mean that when a given instruction's language deviated from an applicable MAI, its error was presumed to be prejudicial.

Then came the next landmark, *Fowler v. Park Corp.*, 673 S.W.2d 749 (Mo.banc 1984) which, in apparent retreat from *Brown, supra*, emphasized the requirement that the prejudicial effect of instructional error shall be determined judicially. *Fowler* held that an instruction was not prejudicial which imposed on the defendant the duty to exercise the highest degree of care while defendant's burden under the law was only to exercise ordinary care.

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[1] Revised and edited by Stephen H. Ringkamp, 1996, 2002, 2010, and 2020.

Now there is an important change in Rule 70.03 which requires specific objections to instructions before submission of the case to the jury.

Why Written Jury instructions? Instructions must be given to the jury to explain how its determination of the facts affects the outcome. The jury is not learned in the law. You, the trial lawyer, and the court, are. The jury must have help and direction in how the law affects the case. Simply to tell the jury abstractly "An automobile driver must exercise the highest degree of care" gives no guidance as to how the abstract rule of law applies to the facts of the case.

The jury instructions must be given in writing because jurors, even collectively, do not have total recall of an oral charge. Justice requires that the jury shall have exact reference to the court's charge available during deliberations. There is no advantage in testing jurors' memories for the instructions as well as for the evidence.

It is the trial court's responsibility to give the instructions. But, since the decision of *Dorman, supra*, it has been your job, the task of the trial lawyer, to aid the court by preparing and tendering to the judge all of the correct written instructions you desire the court to give. If the court doesn't give an instruction to which your client is entitled or you have not prepared it correctly, and *asked that it be given*, you are to blame, not the court.

Why Compulsory MAIs? The reason for compulsory MAIs is the need for simplicity.

Lawyers, left to their own devices, know no bounds to attempts to "improve" instructions by changing or adding a few more words here and there. Before the advent of MAI, a jury instruction on so simple a concept as the requirement that a plaintiff must prove facts entitling recovery, became verbose, redundant, and argumentative messages of a page and a half in length. Because their verbosity did not constitute *reversible* error, they became "court approved".

Increasing confusion of juries and reversals for other instructional error required that some standard of simple, understandable language and style be imposed. That standard is MAI. If a provided MAI is applicable it must be used. If there is no MAI precisely applicable to the case, the *form* of MAI must be used.

Innovation and improvement on MAI is prohibited in the interest of a standard for jury instruction. Doubtless you could improve on any of several of the MAI instructions, but, you channel the trial court into error if you do. Why take the chance that the error might be held, judicially, to be prejudicial?

Drafting a jury instruction is an exercise in precise translation.

It is commonly known that in Europe some proficiency in foreign language is taught in the schools, and that when a German and a Spaniard meet, they converse in German or Spanish, or, if neither is comfortable in the other's native tongue, they converse in a third common language, i.e., English, French or Russian.

Communicating the result of your own legal education to a lay jury by MAI is similar. Think of your task in that manner as you worry about MAI problems in instructing your juries.

You know your native tongue, "Legalese", but the jury does not. Both you and the jury can understand "MAIyan", the language of MAI. It is your task to translate your "Legalese" thoughts and principles into "MAIyan" so that the jury may understand clearly the factual issues of your claim or defense and act properly in deciding the case.

Lawyers pride themselves on accuracy of expression. But that precision is largely used for other lawyers. Contracts, deeds and statutes contain groups of words which seem to have the same meaning to a lay person. Lawyers recognize shades of differences and nuances according to law. Ordinarily, jurors do not.

It can not be stressed too heavily nor repeated too often: jury instructions are written to communicate with lay people. Thus, if there is no way to avoid using "Legalese" in an MAI instruction, i.e., "negligence" or "fair market value", you are required to translate the "Legalese" for the jury. Again, there are to be no flights of fancy or ingenuity employed, no free translations. Translation of legal terms must be made by one of the provided MAI definitions, or, if none is provided, then by a not-in-MAI instruction drawn in the form of the MAI examples of definitions.

The MAI definitions provided are mandatory if applicable. Other definitions *may* be required but you must protect your trial record if that is so. If the other lawyer uses a legal term for which there is no mandatory definition but which you think requires definitions, you must request the definition. Otherwise, *you* waive it.

Naturally there are bound to be differences of opinion over whether a term which is not defined in the MAI definitions *requires* definition. That is why disputes over requirements of definition are left, ordinarily, to the sound discretion of the judge. Someone must decide. It is the court, whose criteria are that the instructions shall be clear, correct, and not unnecessarily complex.

In summary, jury instructions translate complicated legal concepts into clear *written* lay language so that as the jury members deliberate, yes or no, on disputed evidence, they may know where the verdict goes.

But, on the chance that in your opinion even the best efforts at translation from "Legalese" into "MAIyan" need further clarification, you are given the chance at explanation of even what the "MAIyan" means by illustrations in "plainer" English (favorable to your client's position) by your jury arguments. See **Use**, *infra*.

Understanding. You must understand what pleadings and evidence mean.

Your task of jury instruction commences as the pleading is drawn no matter whether you are counsel for plaintiff or defendant. Some lawyers check their pleadings against MAI before ever filing the lawsuit. The single most important part of instructing a jury in the law is your own *understanding* of the law. The MAI is a valuable reference in that regard.

The lawyer *must* know the controlling law of the case.

Understanding a "cause of action", a "claim", a "denial", an "affirmative defense", all require an *understanding* of factual elements. You must *understand* the pleadings in order to use MAI accurately, whether you are claimant's counsel or defense counsel.

If you don't *understand the elements* of your own pleaded position you can not expect to select, consistently, the proper MAI instructions by chance, or by hit or miss. The MAI book can not do it for you. You are the lawyer. The same is true if you do not understand the elements of your opponent's position. You can not do combat if you do not understand.

The understanding which is true of the pleadings is true of the evidence. If you do not understand the legal and probative significance of *evidence* as it comes in at trial, you will be sorely pressed to accurately select the MAI instructions. Evidence admitted by consent of the parties can change the pleadings, whether the pleadings are mechanically amended to conform to the proof or are simply deemed in law to have been amended to conform with the proof. Unpleaded issues frequently are tried by consent.

You must understand what the *fact* issues are.

If the dispute is over the color of a shirt, you serve no purpose in having the jury waste its time deciding where the shirt was purchased.

Two basic causes of reversal for erroneous jury instruction, which occur frequently enough to cause worry, are twin, (1) the erroneous instruction submitted a claim (or defense) which was not pleaded nor tried by consent and (2) the erroneous instruction was not supported by substantial, probative evidence. In other words, you are not entitled to have the jury find facts which you have not proved.

Such errors may be laid at the door of not *understanding* what the pleading says in terms of legal claim or defense or to not *understanding* what the evidence means in terms of proof.

If your petition states plainly that the defendant who hit your client's car did not stop at the stop sign when your client was driving by, and the answer admits that the defendant failed to stop at the stop sign; it would seem that you have no worry about submitting an instruction under MAI 17.01. But, you may. Have you pleaded that the vehicles and the stop sign were upon public highways? Failure to stop at a stop sign on private property does not necessarily prove breach of a duty which is an element of a tort claim. Have you pleaded that the failure to stop at the stop sign was a direct cause of your client's injury? Causation is a necessary element of a tort claim.

CAUTION: MALPRACTICE ALERT. Amendments to Rules 55.27(g)(2) and 78.07(a) (both effective January 1, 2012) and Rule 84.13(a) (effective July 1, 2012), when read together, require that allegations of error (including sufficiency or deficiency of pleadings) be presented to and expressly decided by the trial court in order to preserve those issues for appellate review. **Such issues**

may no longer be raised for the first time on appeal and must be raised in a post-trial motion (and possibly earlier if so required by the rules). THIS IS A MAJOR CHANGE IN THE MISSOURI PROCEDURAL REQUIREMENTS FOR PRESERVATION OF ERROR ON APPEAL.

Instructions submitting unpleaded issues, even those actually tried over objection, are erroneous.

Such an error is not cured by the fact that the instruction is directly from your MAI book.

You must understand the elements of a submitted claim or defense and make the instructions conform. If you don't and the trial judge gives your instructions, it is judicial error, but your loss.

The following sort of elemental reasoning is suggested as appropriate in approaching your task of jury instruction in a simple negligence tort case. The elements of the claim are three, (1) a duty, (2) a breach and (3) a harmful result (causation of damage).

Take the facts of a simple case of negligence as an illustration of thinking of how to instruct a jury. Plaintiff has the first burden and both sides may profit from the illustration of how a plaintiff might approach the task of preparing instructions.

Plaintiff, George White, drove east on a public street protected by stop signs. Crossing southbound, defendant, Joe Black, did not stop at the stop sign and collided with plaintiff's car in the intersection. Plaintiff claims injury. Defendant (1) denies and (2) claims excuse as a defense—a sudden, unanticipated brake failure.

The elements of the claimant's right to recover are in the conjunctive; *all* elements must be proved. Thus, your logic of the claimant's legal claim might be; "If the defendant had a duty to exercise care to avoid injury to the claimant and breached that duty *and* thereby caused resultant damage to the claimant, the claimant is entitled to recover money damages by judgment".

On the other hand, the defendant has a denial defense ("it didn't happen.") which is disjunctive all the way. Under the defense of denial if *any* element of the claimant's proof is missing or unbelievable, defendant wins. The defendant also has a positive "defense"—excuse—in which *all* of defendant's elements must be proved in order to prevail.

Thus, for the defense, the thinking is by progressive steps and is a little more complex, "If I had *no duty* to claimant, I win", or, "If I *had* a duty to claimant but did not breach it, I win", *or*, "If I had a duty to claimant and breached it but did *no harm* to claimant, I win". Defendant thinks further, "If I can prove my brakes failed suddenly and unforeseeably, I can win because I will have proved that I did not violate my duty to stop, my brakes did." (No negligence.)

That is the sort of legal analysis which must be used in approaching MAI, partly fact and partly law. The fact issues portion of it goes to the jury via MAI for decision. The law of it is employed in the selection, preparation, and tender of MAI instructions to the court and, very importantly, in your jury arguments. See: **Use**, *infra*.

For those who may wonder how the existence of a legal duty could ever be a question of fact rather than a matter of law, it is suggested that the *facts* comprising the legal condition of the agency of an active tortfeasor (which is a condition precedent to a *legal duty being imposed upon his principal*) would be such an occasion.

The plaintiff's attorney in approaching the MAI analysis in this simple factual case should think along these lines and if it is helpful, make a checklist:

a. What duty did defendant Black owe to plaintiff?—(specifically, a duty to stop at the stop sign.) Defendant may have had other duties but that is the duty upon which reliance is placed in view of the anticipated evidence.

b. How did defendant breach the duty?
Defendant failed to stop. Defendant says the brakes failed, but that's just what the defendant says. Under the evidence, can defendant prove it? It is up to defendant to show an excuse for violating a traffic regulation enacted for plaintiff's safety.

c. How did defendant damage plaintiff?
Defendant hit plaintiff broadside in the intersection spraining plaintiff's back causing loss of wages, medical expense and impaired working ability.

On the probability that plaintiff will make a submissible case, defendant's counsel will think similarly:

a. There is no doubt that defendant had a duty to stop.
Since duty is admitted, there will not be any dispute for the jury to decide.

b. There is an issue over whether defendant breached the duty.

Sudden brake failure can be believed by the jury, and, if it is, defendant will be excused for failing to stop. The defense wins because plaintiff will *fail to convince* that defendant breached the duty; the law excuses defendant for failure to stop.

c. There is a dispute over whether plaintiff was injured.

The impact was slight; the physical damage to the cars was almost insignificant and there is evidence that plaintiff made a claim for back injury once before. Even if defendant breached a duty, the defense wins if plaintiff can not prove injury caused by defendant's breach.

Selection. Your selection of instructions is a three part task.

First, there are instructions which must be given in every case. Those are the *mandatory* instructions. Omission is error.

Second, there are instructions which *must* be given *in your particular* case. According to what "Legalese" unavoidably must be used in the instructions (here, *"negligent", "highest degree of care"*), translation (definition) instructions must be given. Those are also mandatory instructions. Omission is error. If you have a damage suit, a damage instruction is mandatory. (*Exception*. In some claims the amount is not in dispute, e.g., an indemnity claim where the amount in dispute is an admitted figure. In those cases the damage instruction is included in the verdict director.)

Third, the format of MAI is mandatory for the instructions which counsel must draft. Thus, if you are for the plaintiff and you do not prepare a verdict directing instruction, that is, an instruction which instructs the jury to return a verdict for your client if it believes the elements of your claim, or if you do not prepare it in the form of MAI (using specific MAI, if applicable), then you have caused the trial judge to err in instructing the jury. It is the court's error, but your loss.

MAI 2.00(C) is mandatory and should be read in all civil cases prior to jury selection. This instruction, also contained at MAI 2.03(A), will be re-read to the jury, and given as part of the final instructions in the case, as instruction number 3, immediately after MAI 2.03.

It is mandatory in every case to tell the jury at the outset what it may expect in the trial (MAI 2.01) and at the close of the case to explain the jury's use of the instructions (MAI 2.03). It is mandatory to assign the burden of proof (MAI 3.01), to disclaim the court's assumption of any fact which may be mentioned in an instruction (MAI 2.02), and to instruct the jury in its powers to return a verdict by concurrence of nine or more jurors (MAI 2.04).

Because the case is a claim for damages as a result of negligent injury, it becomes mandatory to define negligence (Ch. 11), to give a measure of damages instruction (See MAI 4.01 or 37.03), and to give the proper verdict form. (See Ch. 36).

Consequently, the mandatory instructions total eleven in our sample case. Ten may be selected without the difficulty of tailoring them to fit our facts. Those may be taken right from the MAI book:

(1) MAI 2.00(C), mandatory and to be read to the venire panel prior to jury selection.

(2) MAI 2.01, mandatory pre-evidence outline of the trial procedure. It must be given as written Instruction No. 1 in every case. It must be read at the commencement of the case.

(3) MAI 2.03, mandatory post-evidence explanation of jury's use of the instructions. It must be given as written Instruction No. 2 in every case. It must be read as the first of the instructions given at the close of the case.

(4) MAI 2.03(A), mandatory instruction regarding jury bias, given as written Instruction No. 3, immediately after MAI 2.03.

(5) MAI 2.02, mandatory caution that court does not assume facts in the instructions. It must be given in every case and may be numbered at the court's discretion.

(6) MAI 2.04, mandatory advice of the power of nine members of the jury to return its verdict. It must be given in every case.

(7) MAI 3.01, mandatory statement of the burden of proof. It must be given in every case.

(8) MAI 11.03, mandatory definition of negligence. Since our sample case must have instructional reference to negligence but will be limited to operators of motor vehicle on the public streets, MAI 11.03 becomes mandatory *in this case*.

(9) MAI 4.01, mandatory measure of damages. Because our case is confined to a claim for personal injury damage, MAI 4.01 comes mandatory *in this case*. (Assuming no comparative fault.)

(10) MAI 36.01, mandatory form of verdict. Our sample case is a single claim of the plaintiff against a single defendant. MAI 36.01 is applicable and thus is mandatory *in this case*.

Since the above nine instructions are mandatory in this case they may be selected at any free time during the pendency of the case, prepared for tender and placed in the file with one worry of trial eliminated in advance, long before final trial preparation.

(11) Selecting the proper verdict directing instruction calls into play your understanding of the law of your claim. In **Understanding**, plaintiff's claim was reduced to its lowest common denominators, (1) duty, (2) breach, and (3) resulting damage. You must have in mind each element of each part of the claim in order to sort out the uncontested ultimate fact issues from those which are contested and must be decided by the jury and to eliminate mere *evidentiary* fact issues which are addressed by jury arguments of counsel **Use**, *infra*.

What fact raises defendant's duty to the plaintiff? It is the mere fact that defendant drove a motor vehicle on the public highway when plaintiff, also, was there. Is that fact, defendant's driving, contested? The answer is no. Thus, the fact of defendant's driving should not be hypothesized. Is the fact that the casualty occurred on the public highways contested? The answer is no. It should not be hypothesized. Either of those two, *if contested*, would be an ultimate (decisive) fact and would require hypothesis in the verdict directing instruction.

The preceding paragraph illustrates a most difficult concept for neophytes to jury instruction. By MAI 17.01, the judge never does say, expressly, that the defendant had a duty to stop and yield to plaintiff. Why not? Well, the trial judge has got to decide the issues of law. The court can not have the jury second guessing an application of the law to the facts of the case. By telling the jury nothing about defendant's legal duties but telling the jury what to do on its decision of the facts, the judge has instructed the jury in the *application of the law* to the facts. By using MAI 17.01, the judge instructs, legally, that if the defendant "violated the traffic signal" he has violated a legal duty imposed on those who (1) operate motor vehicles (2) on public streets and (3) approach traffic control signals which (4) are in place under authority of law. The judge does not instruct by stating abstract rules of law but by deciding, as a matter of law, which rules of law are applicable and telling the jury what to do on the jury's decision of the facts.

The frequently heard complaint, "The judge didn't tell the jury the defendant had a duty to stop" is invalid. The judge does tell the jury. This message is paraphrased as; "If you find the fact to be that defendant violated the traffic signal, then he violated his legal duty to plaintiff to stop and yield to plaintiff." Under MAI, the judge continues to decide and apply the law and, thus, instructs in the law; the jury decides the facts and does what the judge tells them to do (as a matter of applied law) with the facts.

Back to the instruction.

What was the breach? Well, there was a lawful traffic sign in a position which made it mandatory for defendant to stop before entering the intersection and defendant did not stop. Put another way, defendant breached the general duty not to collide with plaintiff's car, or, not to injure plaintiff. Is the fact that the stop sign was there contested? The answer is no. That fact should not be hypothesized. Is the fact that the stop sign was placed there by some person with authority contested? The answer is no and that fact should not be hypothesized.

Are the facts that plaintiff was driving east or that defendant was driving south or that there was a collision in the intersection contested? No. Those facts should not be hypothesized. They are examples of evidentiary facts. Not only are they not in dispute, even if they were in dispute they would not be hypothesized because they would *be only evidentiary facts*.

Is the fact that defendant disobeyed the stop sign contested? The answer is yes. Defendant admits that defendant did not manage to get the car stopped at the stop sign, but defendant contests the allegation that defendant disobeyed or violated the traffic signal because defendant claims that the car's brakes *unexpectedly* failed. If brake failure is true, the jury could find that defendant was helpless and could not avoid passing the sign without stopping and was not negligent in doing so. Because of the evidence tending to show unexpected brake failure, both the violation of the stop sign and the *ultimate fact* that the violation was negligent must be submitted to the jury as disputed *ultimate* facts. The evidentiary facts are the subject of jury argument. Only the *ultimate* disputed facts should be hypothesized in the instructions.

A discussion of this principle of evidentiary fact versus *ultimate* fact is important. One of the major faults with pre-MAI instructions lay in the unnecessary hypothesis of undisputed evidentiary facts with the result that instructions became so long, through caution of counsel to include all possible essential facts, that they became unmanageable.

In this sample case, whether or not defendant's brakes unexpectedly failed is a disputed fact, true enough. But, it is only evidentiary and bears upon the ultimate fact of whether defendant *negligently* violated the traffic signal. Defendant is not entitled to an instruction on brake failure. Defendant must argue it and is given full opportunity to do so. Defendant has the instructional definition of negligence to argue. Even with the highest degree of care, if the brakes went out unexpectantly, defendant may argue that there was nothing defendant could do about it and thus can not be found to have failed to exercise care in not stopping at the stop sign. That is the negative of plaintiff's burden to prove the ultimate fact of negligence in failing to stop at the stop sign. Whether or not hydraulic fluid was found on the street to the north of the stop sign at a position which would indicate brake failure at a point where defendant could have gotten stopped except for brake failure also is an evidentiary fact. Evidentiary facts should not be hypothesized. Plaintiff can argue the absence of brake fluid on the street from which the jury could find that if the brakes actually did fail to stop defendant's car, the brake failure was not unexpected. Plaintiff is not entitled to an instruction on the absence of brake fluid in the street.

The ultimate fact question is, "Did defendant *negligently* violate the traffic signal?" Plaintiff says: "Yes, defendant just came right on through the stop sign." The testimony is evidentiary. Defendant says: "No, my brakes unexpectedly failed." That testimony is evidentiary and an excuse for not stopping. Neither version of how the stop sign was violated should be hypothesized.

The third element of plaintiff's case is the question of resultant damage.

Is the fact that plaintiff was damaged in dispute? The answer is yes and that fact must be submitted for jury decision.

MAI 17.01 is the instruction form which fits plaintiff's need. The only further decision plaintiff need make is whether or not to include the bracketed "tail" reference to a complete affirmative defense and that depends upon defendant's success in proving a *submissible* affirmative defense, such as a release, and then in deciding *to submit* on it.

The plaintiff can not know for certain whether a complete affirmative defense will be submitted to the jury. It is error for a verdict directing instruction (MAI 17.01) to fail to refer to a complete affirmative defense. It behooves plaintiff to have MAI 17.01 typed up both ways, with and without the "tail" so that the instruction conference will not be extended while an instruction is retyped to meet the need. The plaintiff should take the same approach in preparing alternate instructions depending on whether or not comparative fault is submissible.

Understanding, Revisited. You must understand the pleadings *and* the evidence.

In this hypothetical, defendant may decide there is ground to plead that plaintiff is partly responsible for his own damage for failing to lookout and avoid the collision. Thus, we now assume defendant has pleaded that plaintiff's comparative negligence partly caused any damage plaintiff sustained. Although contributory negligence no longer is a complete bar to recovery of tort damages; under principles of comparative fault, plaintiff's negligence will reduce the amount of damages reflected in a plaintiff's verdict as total damages.

For the defense, the analysis has added a step. It now is, "If I had *no duty* to claimant, I win", or, "If I *had* a duty to claimant but did not breach it, I win", or "If I had a duty to claimant and breached it but did *no harm* to claimant, I win", or, "If I had a duty to claimant *and* breached it *and* caused him damage *and if* claimant also had a duty to himself and breached it and thereby contributed to cause his own damage, I *can still partly win*."

MAI 17.01 does not provide for part-win cases. With plaintiff's required understanding of the petition as affected by defendant's answer, plaintiff realizes that if defendant makes a submissible case on comparative fault, plaintiff's use of MAI 17.01 must be as that instruction is changed under MAI 37.01. Rather than being entitled to an absolute verdict and judgment for all his damages against defendant, plaintiff is relegated to having a percentage of fault assessed against defendant and to having plaintiff's damages reduced by an assessment of fault against plaintiff.

It is imperative to understand the pleadings and the evidence.

Preparation. Prepare your instructions early. It is comparatively easy to sit in the quiet of an evening and look over this article on how to prepare and use instructions. It is quite another thing to try to read it, apply it, and prepare instructions in the limited time available during a trial. If instructions were the only thing to worry about during trial, mistakes of omission in the instructions seldom would occur. An accident of omission by a typist can require another trial. During trial the immediate pressing matters of trial crowd the problems of instructions for time. You have to worry about jury selection, opening statement, witnesses appearing at proper times, the order of witnesses, shuffling order to accommodate prima donna witnesses, elements of proof, foundations, unexpected rulings on evidence, and a multitude of problems which require your immediate attention. Trial time or lack of time is not conducive to the deliberation which you must give to the instructions which you prepare and tender.

Use of a separate folder to contain the instructions and any amendments to pleadings made during trial is advisable. A most helpful part of such a folder is a checklist which is attached so that it may be located immediately. For the plaintiff in our hypothetical case it could take this form:

	Offered	Marked	Ruling
Petition amendment			
Answer amendment			
Motion, close of plaintiff's evidence			
Motion, close of evidence			
Instructions:			
Mandatory			
2.00(C)	(given before jury selection)		
2.01	1 given		
2.03	2		
2.03(A)	3		
court does not assume facts (2.02)			
return of verdict explanation (2.04)			
burden of proof (3.01)			
definition of negligence (11.03)			
measure of damages (4.01 or 37.03)			
form of verdict (36.01 or 37.07)			
Needed			
verdict director:			
without comparative fault modification (17.01)			
with comparative fault modification (37.01)			
Defendant's offers:			
Comparative fault (37.02)			
Converse (Ch. 33)			

You must prepare each instruction you intend to offer in a clean form to be sent to the jury and, for the court file, a copy of each instruction bearing a notation of its source and, for each opponent, a similar copy. (If one lawyer represents more than one party, one copy for each lawyer will suffice). For your own use you will need two copies of each instruction which you offer.

Why two?

When you tender an instruction the court may refuse to give it. If you think the refusal is erroneous, you should have it marked as a tendered and refused instruction for identification on appeal. If the court indicates that the refused instruction would be given with some editing, then you may use your extra copy to make the necessary changes by interlineation for retyping in clean form for tender and submission under a different instruction number or letter. For simplicity, a "given" instruction should be numbered and a "refused" instruction should be lettered.

Thus (except for the mandatory instructions which are straight out of MAI without any alteration made to fit the case), you should prepare an original (without any marking to show its source) and four copies (bearing MAI number, MAI number modified, not-in-MAI and prepared by plaintiff, or defendant) of each instruction: a copy for the court, a copy for your opponent, and two copies for you.

As you have seen, some instructions should be prepared in more than one form. It is too late to have the verdict director typed after the close of the evidence when the plaintiff ordinarily first will know for certain that a complete affirmative defense or comparative fault will or will not be submitted. You should have plaintiff's verdict directing instructions typed both ways, in advance.

When you are preparing your instructions you may believe that a particular essential element of your case or defense will be conceded or agreed to but you are not sure. Although it may be essential, if it is not an issue, your instruction need not hypothesize it as a controverted ultimate fact. However, if it is *not conceded*, the instruction must hypothesize it for the finding of the jury. An example would be the fact of who was driving a car in an automobile collision case. Ordinarily, no issue is made of who was driving. On occasion, particularly in catastrophic cases where all occupants are dead, the issue of who was driving is vital and might not be conceded.

Thus, if you have reason to believe that an essential element may be conceded but you are not sure, the instruction should be prepared both ways, with and without that hypothesized element.

Particularly in rural circuits, one day jury trials are not uncommon. It is obvious that there is a practical necessity to have your instructions prepared and typed in all forms for which you can anticipate need. There may be no overnight recess to use for instruction preparation. Thus, although you may have a simple case, you may have in your possession for *possible* use an amazing number of alternative different instructions. Not all will be tendered to the court for use. You must have some order in your instruction folder.

One such plan is this. Assume that you are not decided at the time you draw your instructions whether you will submit on speed and failure to keep a lookout or only on speed. Often times you will not decide until the close of the evidence. That indecision will require two forms of your main verdict directing instruction. Then on top of that, you do not know whether the defendant will be permitted to submit on comparative fault. That additional indecision will require two versions of each of your two forms, with and without the comparative fault modification of MAI 37.01. Thus, you will have prepared four different forms of one instruction to take to court with you.

Prepare an instruction label for each form of the instruction on a separate piece of paper or card about the size of a business card and type on it a generic description of the instruction, i.e.,

"Verdict director, Speed only"

"Verdict director, Speed and lookout"

Those small labels can be slipped under the paper clip which hold the original and copies of each instruction together, and all four such versions of one instruction, being labeled for easy identification, can be clipped together in your instruction folder. In the instruction conference you readily can select your verdict director bundle of four versions and see, without reading and comparing them, which of the four you are handing for tender and distribution to the court and your opponent. The others can be left fastened together and laid aside as a bundle.

It may be helpful and advisable to label all instructions similarly and to clip them together in natural bunches of instructions. For instance, all mandatory instructions can be clipped together for easy access in the instruction conference and, similarly, all cautionary instructions which you prepare for possible tender.

If you do not settle upon some usable system to keep your prepared instructions readily available when called for in the instruction conference, you will find yourself involved in the distraction of an embarrassing paper shuffle instead of being able to devote your attention to the substance of the conference.

Tender. The actual tender of your instructions to the court will depend upon the trial judges. They are individuals and each may handle the instruction conferences according to differing experience and ideas.

If you do not know what the judge expects, ask!

In some circuits, MAI 2.01 is prepared by the court; in others the plaintiff is expected to prepare it. If you are plaintiff and in doubt, prepare it. (**Caution:** Judges' stenographers are not immune to typographical error. An error is an error regardless of who mistyped it. Read all prepared instructions. If a furnished instruction leaves something out, it is error.)

If the judge does not read Instruction No. 1 (MAI 2.01) to the jury at the commencement of trial, it is error. It is the court's error but your loss. See that the judge is reminded to read it if it should be overlooked. It is your responsibility to do it.

Ordinarily, a trial judge will ask for instructions during the instruction conference in the order they will be considered. The judge may even ask for your verdict directing instructions in advance of the conference or even in advance of trial. If the court does ask in advance and for some reason you have not yet drawn it, be ready to tell the judge what grounds you intend to submit, or from what grounds you yet intend to make your selection.

If the judge asks only for specific instructions during the jury instruction conference, give only the ones asked for. Do not drop a whole bundle on the desk and impose the task of paper shuffler upon the judge. There will be enough paper shuffling despite all efforts to keep it to a minimum.

If the trial judge does not make specific requests but leaves it to you to tender your instructions in the order you wish, make it plain what it is that you are handing to the court and your opponent. It costs you nothing to say, "Here is the cautionary against assuming facts", or, "This is the measure of damages", or, "This is the verdict director on speed." Of course, the judge and your opponent can read an instruction to see what it references but your identifying statement can save time. They will know what to expect when they commence to read it. That is the reason we put titles on books.

If you have followed the suggestions of this section on how to instruct juries, you will have prepared a checklist attached to your instruction folder. See, **Preparation**, above.

The judge will number the instructions to be given to the jury. Numbering on instructions is in large part discretionary but there are important exceptions. The number for MAI 2.01 is always No. 1. So, also, is the number 2 reserved for MAI 2.03. If your case requires submission of more than one claim to the jury, the order and numbering of instructions is governed more closely by the requirements of the "package" method of submission. You should pay attention to the sequence in which the instructions are numbered in order to help prevent error.

As you tender an instruction to the judge, make a check mark on your checklist, indicating that it has been tendered. Mark on your checklist in the column headed "Marked" the number and in the column headed "Ruling" a symbol indicating that it is given. If it is refused and the court does not mark it refused of its own volition, request that it be marked for identification as a refused instruction and check your list accordingly. You will find that your checklist is invaluable to you if there is an appeal.

Mark your own file copies of the instructions (both your own and the copies furnished to you of opponent's tendered instructions) with the numbers used by the court and note right on them, either "given" or "refused". Keep your own file in order. If you do, at the end of the instruction conference you will have an accurate record of the status of every instruction you prepared as either not tendered or tendered and, if tendered, either given or refused. You will also have a similar record of all instructions your opponent tendered.

It is possible to function without a checklist in a simple case, it is true. But, as you consider the complexities of jury instructions in a multi-claim, multi-party case, you will come to a quick realization that an adequate checklist is essential to your efficient operation.

During the instruction conference it may occur to you that there is an error in your opponent's instruction. What you do about this is for you to decide. You are the advocate. Beware however, Rule 70.03 requires ALL objections to instructions to be made BEFORE submission of the case to the jury. You are the advocate. If no objection is made BEFORE submission, an appellate court will not view kindly an effort at "sandbagging" on those objections.

Use. Your use of the instructions at trial commences when the trial judge reads them to the jury. Listen to the reading.

It is a great temptation to be thinking about your clever argument to the jury, but listen to the judge read the instructions. Few things are more discouraging than to realize immediately after the jury has decided in your opponent's favor, and has been discharged, that there is reversible but unpreserved error in the instructions.

More than one lawyer has been caught short by the realization that the judge read an erroneous instruction to the jury.

What should you do?

Call it to the attention of the court immediately.

The judge has control of the trial and can do what is necessary to eliminate error.

As the reading of that or the next instruction is completed, stand and politely interrupt and ask leave to approach the bench. The judge will realize something is wrong. Suggest that opposing counsel join you at the bench and point out the error. If it is a matter of mere typographical omission of a word or phrase, the judge may correct it by interlineation and read the correct instruction to the jury with no more than a simple explanation that a word was left out by mistake. If it is a more extensive correction, the judge may choose to tell the jury that it has come to the attention of the court that more work must be done, declare a recess, and cure the error.

The important thing is that the error should be corrected before the jury is permitted to taint its deliberation with that error.

From 1934 to 1962, jury instructions had come to contain argument. Argument should not be included in MAI instructions. Therefore, your use of MAI includes your supplemental jury summation, explanations of the underlying law, and reasons for the instructions the court has given in writing. In this way, the lawyers “flesh out” the instructions.

A frequent unjustified criticism heard of MAI is that the jury is not advised abstractly of the rights of a litigant by the instructions. The answer is that the jury is not supposed to be so advised in the instructions. Those are argued by counsel.

The instruction message is simply, “if you believe these propositions of fact to be true, plaintiff wins. If you fail to believe them, plaintiff loses.”

In our exemplar case, failing to stop at the stop sign can be found to have been negligence. It need not be so found. It is up to the advocates to persuade the jury that it was or was not negligence under the circumstances. That must be done in argument. That is advocacy. The instructions support your argument and your argument illustrates the operation of the instructions on the case.

Many things can not be stated in the instructions. Those are the matters which are rules of law, presumptions, inferences and the like.

Every lawyer knows that a deceased accident victim is presumed to have exercised care for decedent’s own safety until evidence of lack of care appears; that every person is presumed to know the law; that there is an arguable adverse inference that a civil litigant who fails to testify on that party’s own behalf would not have helped a particular position, that an adverse presumption arises against the spoiler of evidence, ad infinitum. Nevertheless, none of those presumptions or inferences or abstract statements of law has any place in a jury instruction.

The exclusion of such matters from instructions has cast a relatively greater importance upon the content of closing argument. With the required disappearance of argument from the court’s instructions, it is in the lawyers’ arguments that the jury now must be “instructed” upon the effect of presumptions, inference, bits of evidence and the like if it will ever be so instructed. Your attention is called to some concrete illustrations of the importance of “fleshing out” the instructions by argument.

Lovelace v. Reed, 486 S.W.2d 417 (Mo. 1972) is a case of a child-pedestrian, wrongful-death by motor vehicle. The submission was on the ultimate fact of the defendant’s failure to keep a lookout. From the written instructions, the jury had no way of knowing the legal effect of defendant’s failure to swerve or sound a warning to the child as those failures would tend to demonstrate causation. The burden fell upon plaintiff’s counsel to “instruct” the jury in those matters by argument. The trial court erroneously restricted plaintiff’s argument of those matters and suffered reversal of its judgment for the defendant because of the court’s unwarranted limitation on argument.

Cook v. Cox, 478 S.W.2d 678 (Mo. 1972) likewise held that although no sole cause instruction may be given, sole cause remains a viable and permissible jury argument if the evidence justifies its use. Thus, all of the intricacies of sole cause as a defense, if supported by evidence, may be developed and urged in argument.

For the proposition that jury arguments are not to be limited by the context of the jury instructions but by the scope of the trial, the interested may see, listed in chronological order: *Lewis v. Bucyrus-Erie, Inc.*, 622 S.W.2d 920 (Mo.banc 1981); *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo.banc 1986); *Barnes v. Tool & Machinery Buildings, Inc.*, 715 S.W.2d 518 (Mo.banc 1986); *Moore v. Missouri Pacific Railroad Co.*, 825 S.W.2d 839 (Mo.banc 1992); *Callahan v. Cardinal Glennon Hospital*, 863 S.W.2d 852 (Mo.banc 1993).

Examination of MAI 4.01 reveals no listing of the elements of damage. The jury knows of those lawful elements only if counsel tells the jury in argument. If defense counsel thinks it is worthwhile that the jury know that its award for personal injury will not be taxed, it is up to counsel in cases other than FELA cases to tell the jury so *if permissible under the law*.

A non-lawyer who reads this monograph might wonder if there is any control over what a lawyer might choose to argue to the jury as controlling rules of law. There is. Each advocate controls the other. The moment an advocate leaves the boundary of the law it is the duty of his opponent to object to *misstatement of the law*.

Differing recollections of the testimony, flights of fancy based on evidence, and strained inferences all come normally in argument and may be accepted under the theory and ruling that the jury will remember and weigh the evidence.

There is no such panacea for misstatements of the law.

If plaintiff's advocate in a commercial case asks for damages for loss of future profits as an element of damage while the evidence is insufficient to take such calculations out of the realm of speculation, the defendant must preserve the issue with a proper objection. The trial court must rule on the objection and will do so. It is not simply a matter that the "jury will remember the evidence" in such a case of an erroneous request for damages which are not supported by evidence if the trial court is advised by the objection that the argument oversteps the boundary of the litigant's legal rights.

So it is if a claimant asks for damages for permanent injury when there is no evidence of permanency or argues an unfavorable inference from the absence of a witness when the witness is not under control of an adversary and so on.

Thus, when the complaint is made that the jury has not been told of the rights of the parties, you might be reasonably sure that counsel has failed in argument. Counsel's failure may well be deliberate and intentional and tactical, but, nevertheless, counsel has failed if the jury has not been advised of the rights of the litigants. The failure does not lie with MAI.

You may reread some, all, or none of the instructions in your argument. You may "flesh out" the instructions in argument by explanation and illustration. You may ignore the instructions in argument.

The decisions are yours.

MISSOURI APPROVED JURY INSTRUCTIONS
Civil (MAI)
Eighth Edition

E1.00

EARLY CASE SUMMARY

E1.00 Early Case Summary—General Comment
E1.01 Early Case Summary

Research References

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E1.00 [2021 Revision] Early Case Summary—General Comment

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is not mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment 2.01I.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

A. Research has demonstrated that early explanation to members of a jury panel regarding the nature of a case will enhance juror understanding of the case and their roles in achieving justice. Therefore, the Committee believes that early case summaries will help jurors perform their roles in the administration of justice in a particular case. The Committee further believes that a format for summarizing cases before jury selection will assist the court and counsel in achieving this goal.

B. An early case summary by the court is not mandatory—but is discretionary. Since cases vary, the format contained at E1.01 must be flexible to accommodate those variations. The guiding principles for creation of an early case summary are the same found in Rule 70.02(b)—simple, brief, impartial, free from argument, and without evidentiary detail. While an early case summary is not an instruction in the technical sense, the Committee believes that "boilerplate" instructions—such as the applicable burden of proof and definition of negligence—should be used in an early case summary.

C. An early case summary should be given before jury selection. The Committee believes that this will assist the jury in understanding the voir dire process in the context of a particular case, and will assist the jury in understanding why certain questions are being asked by the attorneys.

D. An early case summary is not intended to replace or shorten the voir dire process, but it is a supplement to voir dire.

E. Early case summaries are not intended to describe all theories or elements. They are intended to describe the basic nature of the case. As such, where a standard legal definition and burden of proof will be of assistance to the court, counsel, or the jurors, they should be included under the proper circumstances. This does not mean that all potential legal definitions or “boilerplate” instructions must be given. It also does not mean that error occurs in the event that certain definitions are included, while others are not. Technical engineering, scientific, or medical definitions should not be included in an early case summary. Such definitions are properly the subject of expert testimony, and should not be given as part of an early case summary, or as instructions at the end of the case.

F. Formulation of an early case summary should involve the attorneys and the judge. The trial court may, by local rule, or by order in individual cases, invite the attorneys to submit proposed early case summaries. Of course, if the parties can agree on an early case summary, that would be optimal. In the final analysis, the trial judge has the right and discretion to determine whether an early case summary is given, and the substance of that early case summary.

G. Because an early case summary is not an instruction, Rule 70.03 would not apply. However, in order to preserve any perceived error in an early case summary, general rules of trial practice and appellate practice would apply, and objections should be made at the earliest opportunity in order to give the trial judge opportunity to correct any such error. Furthermore, because an early case summary may incorporate certain “boilerplate” instructions, such as burden of proof and/or definition of negligence, care must be taken to follow Rule 70.03 with respect to those actual instructions.

H. Because the format of E1.01 is intended to accommodate all civil cases, it is also intended to accommodate not-in-MAI theories. Again, it is critical in this situation to follow the directives of the guiding principles in Rule 70.02(b).

I. This Committee has previously recommended that *each juror* be provided with a copy of the final instructions. The court may consider whether a written copy of an early case summary be given to *each juror*, possibly as part of a juror notebook, which may also contain MAI 2.00(A) and any admonitions given by the court which may be derived from MAI 2.00(B). See Comment F to MAI 2.01.

Research References

West's Key Number Digest
West's Key Number Digest ⚷185, 201, 215, 217, 220

Legal Encyclopedias
C.J.S., Trial § 294

E1.01 [2017 New] Early Case Summary

(1) I would like to explain why we are here today. This is a civil case. A civil trial is different from a criminal trial where the defendant is charged with a crime and could go to jail. A civil trial involves a disagreement between parties where the claims have been brought here to be resolved.

(2) At this time, I will give you a brief description of the case you will hear and the meaning of some important legal terms. This is to help you understand the nature of this case and assist you in evaluating the evidence.

(3) The plaintiff is the party who filed this case. Let me introduce the plaintiff to you *(here introduce the plaintiff and/or plaintiff's representative).*[1]

(4) The defendant is the party against whom the case has been filed. Let me introduce the defendant to you *(here introduce the defendant and/or defendant's representative).*[1]

(5) This is a case involving *(insert a brief description of the nature of the case).*[2]

(6) The plaintiff claims that *(insert the basis of the claim)*[3], that plaintiff was damaged [or injured], and should be compensated.[4]

(7) The defendant disputes the claims of plaintiff [and further claims that *(insert the basis of the claim)*,[5] that defendant was damaged [or injured], and should be compensated].[6]

(8) [The plaintiff disputes the claims of defendant][6,7]

(9) *(Insert the appropriate definition of negligence, if applicable)*[8]

(10) The Burden of Proof is as follows:

(Insert Burden of Proof)[9]

(11) [Where more than one party is claimed to be

negligent and at fault, you, the jury, will decide if any party is at fault and assess percentages of fault. If appropriate, you will also award damages.][10]

(12) Your verdict must be based on the final instructions given to you after all the evidence. Justice requires that you not make up your mind about the case until all the evidence has been seen and heard and all of you enter the jury room for deliberation of your verdict.

Notes on Use (2017 New)

1. If there are multiple parties, make appropriate grammatical changes throughout.

2. The following are appropriate examples of such a description: "motor vehicle collision;" "medical care;" "alleged breach of contract;" "alleged defective product," etc.

3. The following are appropriate examples of such a description: "defendant was negligent;" "defendant breached a contract;" "defendant's product was defective."

4. If plaintiff also claims punitive damages then the following may be added to the description of plaintiff's claims:

> Plaintiff also claims that defendant should be responsible for punitive damages to punish [or deter] the defendant. I will determine whether the evidence is sufficient for you to consider an award of punitive damages in addition to damages to compensate plaintiff.

5. Defendant may not only dispute plaintiff's claims, but may also make claims against the plaintiff such as comparative fault, a counterclaim for damages, or a complete affirmative defense such as a release. Use this paragraph to simply describe such a claim by the defendant. Appropriate examples of such a description are: "plaintiff was negligent;" "plaintiff breached a contract;" "plaintiff released plaintiff's claim in writing," etc.

6. This phrase is appropriate if defendant makes a counterclaim for damages.

7. If there are additional claims (such as cross-claims or third party claims), insert a simple paragraph(s) here. Re-number the remaining paragraphs as necessary.

8. In the event other definitions are appropriate, they may be included.

9. Although MAI 3.01 is often the appropriate burden of proof, some cases use an alternative burden of proof.

10. In a comparative fault case, Paragraph 11 may be used.

Committee Comment (2017 New)

A. The numbers identifying each paragraph are provided as a guide for the court and counsel for discussion and ease of formulation, but the numbers should not be read to the jury.

Research References

West's Key Number Digest
Trial 🔑201, 217

Legal Encyclopedias
C.J.S., Trial § 294

1.00

PROHIBITED INSTRUCTIONS

1.00 Prohibited Instructions—General Comment
1.01 Unavoidable Accident Instructions
1.02 Conjunctive Submissions
1.03 Sole Cause Instructions
1.04 Sudden Emergency Instructions
1.05 Physical Facts Instructions
1.06 Advance Payment or Partial Settlement Instructions

Research References

West's Key Number Digest

Damages 🔑210(1); Negligence 🔑1720, 1726, 1741; Trial 🔑184, 186, 204, 234(1), 243

A.L.R. Library

A.L.R. Index, Instructions to Jury; Sudden Emergency Doctrine; Unavoidable or Inevitable Accident

West's A.L.R. Digest, Damages 🔑210(1); Negligence 🔑1720, 1726, 1741; Trial 🔑184, 186, 204, 234(1), 243

Legal Encyclopedias

Am. Jur. 2d, Automobiles §§ 1050, 1052; Negligence § 38

C.J.S., Motor Vehicles § 1457; Negligence §§ 998, 1002

1.00 [2021 Revision] Prohibited Instructions—General Comment

A. Chapter 1 prohibits certain instructions. It is not intended to be an exhaustive list of prohibited instructions. There may be other types of instructions that are prohibited by case law or rule.

B. For example, "abstract statements of law" and "act of God" instructions have routinely been condemned by the courts. Rule 70 prohibits instructions that submit to the jury or require findings of "detailed evidentiary facts."

C. Because an instruction is prohibited on a subject *does not necessarily* mean that evidence and argument are also prohibited. The classic example is the prohibited "sole cause" instruction. See MAI 1.03. It is well established that "sole cause" evidence and argument are permissible, though an instruction on the subject is not.

D. The Committee notes that in *Pisoni v. Steak 'N Shake Operations, Inc.*, 468 S.W.3d 922, 926–28 (Mo.App. E.D. 2015), the court reviewed the Missouri case law on the subject of "spoliation" in the context of an adverse inference instruction. The *Pisoni* court stated that spoliation, when established, may result in different remedies allowed by the trial court, including an adverse inference argument, preclusion of the offending party's evidence as to what the missing evidence showed, and/or an "admission" against the offending party—but that a jury instruction on "spoliation" has not been approved under current Missouri case law. See also *Berger v. Copeland Corp., LLC*, 505 S.W.3d 337, 338–41 (Mo.App. S.D. 2016); cf: *Freight House Lofts Condo Ass'n v. VSI Meters Servs., Inc.*, 402 S.W.3d 586, 594–96 (Mo.App. W.D. 2013); but see *Hill v. SSM Health Care St. Louis*, 563 S.W.3d 757, 763 n.1 (Mo.App. E.D. 2018). The court in *Pisoni* cited with approval the Committee's observations in MAI (Civil), Why and How to Instruct a Jury, at LXXV–LXXVI, as follows:

> Every lawyer knows that . . . an adverse presumption arises against the spoiler of evidence, ad infinitum. Nevertheless none of those presumptions or inferences or

abstract statements of law has any place in a jury instruction.

In the absence of further appellate guidance, the Committee continues to adhere to the view expressed in *Pisoni*, but notes that other remedies may be properly fashioned by the trial court under circumstances different from those in reported Missouri decisions. The Supreme Court has not definitively addressed these issues.

It is not the intent of the Committee to prohibit or inhibit the sound discretion of the trial court with respect to such an instruction to punish inappropriate conduct in trial or discovery by a party where the facts justify either an adverse inference argument, or possibly an instruction. Neither does the Committee wish to preclude appellate analysis and development of the law on this subject as to if, when, or how, a jury might be given an adverse inference instruction.

Research References

West's Key Number Digest
Trial 🔑184

1.01 [1965 New] Unavoidable Accident Instructions

No unavoidable accident instructions may be given.

Committee Comment (2021 Revision)

A. The decisions on the subject note that the word "accident" may be misunderstood by the jury. As the court said in the landmark case of *Hogan v. Kansas City Public Service Co.*, 322 Mo. 1103, 1115, 19 S.W.2d 707, 713 (Mo.banc 1929):

> The word "accident," in popular acceptation and sometimes in law, may denote an occurrence arising without intent or design, or even from the carelessness of man; but in the law of negligence it signifies an event resulting in damage or injury, proceeding from an unknown cause or from a known cause, without human agency or without human fault.

B. The *Hogan* case suggests that there are times when an accident instruction would be proper, but lawyers have had difficulty finding such cases. The Missouri Supreme Court in *Littlefield v. Laughlin*, 327 S.W.2d 863, 868 (Mo. 1959), said:

> . . . our research has disclosed no case subsequent to the Hogan case in which an accident instruction has been approved, and we find it difficult to conceive of a factual situation in which an accident instruction may properly be given under the rules there set out notwithstanding the language indicating that such situations could exist.

C. In cases where the evidence shows that the cause of an accident is unknown, defendants will probably be entitled to directed verdicts.

Research References

West's Key Number Digest
Negligence ⚷1720

Legal Encyclopedias
C.J.S., Motor Vehicles § 1457; Negligence § 1002

Annotations

In general 1
Skidding 2

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1. In general

Prohibition against unavoidable accident instructions did not change right of defendants in wrongful death action to deny claim of negligence against them and to present evidence that they were free of such negligence, and defense counsel's argument that did not exceed those boundaries was not plain error. *Chong Kee Min v. Wun Sik Hong*, 802 S.W.2d 171 (Mo.App. S.D. 1991).

Although emergency instructions are no longer permitted under MAI, defense of justification or excuse remains, and defendant may introduce any evidence which tends to establish he is not guilty of negligence. *Cowell v. Thompson*, 713 S.W.2d 52 (Mo.App. E.D. 1986).

MAI's 1.01, 1.03 and 1.04 do not preclude the defenses of unavoidable accident, sudden emergency or sole cause, which defenses negated defendant's negligence, but are sufficiently presented by evidence, a converse of plaintiff's verdict director and argument to the jury. *Coffel v. Spradley*, 495 S.W.2d 735 (Mo.App. 1973).

Defendant's verdict director exonerating him if sudden brake failure was sole cause of rear end collision was condemned as a sole cause instruction (MAI 1.03), as a sudden emergency instruction (MAI 1.04) and as an unavoidable accident instruction (MAI 1.01). *Johnson v. Harrington*, 443 S.W.2d 1 (Mo.App. 1969).

Rear-ended plaintiff submitted under MAI 17.16. Defendant's excuse was unexpected slide and brake failure. Defendant offered, but the court refused, an "if you believe" instruction hypothesizing the unexpected slide and brake failure. Refusal upheld because the instruction presented prohibited defense of unavoidable accident. *Suchara v. St. Louis Pub. Serv. Co.*, 410 S.W.2d 93 (Mo.App. 1966).

2. Skidding

Where plaintiff properly submitted MAI 17. 13, driving on wrong side of the road, and defendant testified she skidded across the center line, it was error to give defendant's affirmative defense instruction exonerating her if she skidded. (This would have been error even had defendant further submitted that her skidding was not negligent.) Such an instruction is akin to an accident instruction condemned by MAI 1.01 and a sole-cause instruction condemned by MAI 1.03. Defendant should be limited to conversing negligence by MAI 33.02(2), and then arguing non-negligent skidding. *Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970).

1.02 [1965 New] Conjunctive Submissions

The practice of submitting dual or multiple theories of recovery or defense in the conjunctive is prohibited.

Committee Comment (1996 Revision)

A. Plaintiffs and defendants, when in doubt as to whether their evidence supported each theory of recovery or defense, have often submitted all such theories in the conjunctive. This practice enabled them, in most cases, to avoid reversible error when it developed that one or more of their theories was not supported by the evidence.

B. The rule was expressed in *Corley v. Kroger Grocery & Baking Co.*, 355 Mo. 4, 11, 193 S.W.2d 897, 900 (1946), as follows:

> [W]here plaintiff's verdict-directing instruction submits several charges of negligence in the conjunctive and there is substantial evidence establishing one or more but not all of said charges, the giving of the instruction is not reversible error.

C. While conjunctive submissions were probably used more often by plaintiffs, defendants also made use of the technique by submitting multiple theories of defense. In approving the practice the court said, "the rule applicable to plaintiff's instructions should also apply to a defendant's instruction." *Knox v. Weathers*, 363 Mo. 1167, 1173, 257 S.W.2d 912, 915 (1953).

D. The practice has not been free from criticism. In *Adams v. Thompson*, 178 S.W.2d 779, 785 (Mo.App. 1944), the late Judge Cave said:

> We deem it unnecessary to decide whether the failure of proof of notice would prevent plaintiff from submitting that ground of negligence in his instruction, because, if so, it was submitted in conjunction with two other grounds of negligence of which there was substantial proof, either of which would entitle the plaintiff to recover. It has frequently been held that where a plaintiff submits several charges of negligence in the conjunctive in an instruction predicating a recovery and there is substantial evidence establishing one or more but not all of said charges, the giving of the instruction is not reversible error. Such submissions have not been approved as technically correct, but have been considered not reversible error and have been tolerated, on the theory that the plaintiff has assumed an unnecessary burden and hence defendant has not been prejudiced. *Guthrie v. City of St. Charles*, en banc, 347 Mo. 1175, 152 S.W.2d 91 [(1941)]; *Lindquist v. K. C. Public Service Company*, 350 Mo. 905, 169 S.W.2d 366 [(1943)]. The writer's

> personal opinion is that such a principle is questionable because it tends to lead to confusion instead of clarity, but it has been announced and followed so many times by the Supreme Court and the other appellate courts of this state that we should and will follow the numerous prior decisions along that line.

E. Conjunctive submissions have not been a "cure all." The litigant whose conjunctive submission included an incorrect statement of statutory or case law committed reversible error though the balance of his submission was legally correct and supported by the evidence. *Miles v. Gaddy*, 357 S.W.2d 897, 901 (Mo.banc 1962); *Donaldson v. Manzella*, 338 S.W.2d 78 (Mo. 1960).

F. The Committee believes that the jury should not be instructed on a theory of recovery or defense not supported by the evidence and that any such submission, whether in the conjunctive or disjunctive, should be reversible error. A theory of recovery or defense should not be submitted unless it can stand alone. It should be made clear that most verdict directing instructions have several *elements* which must be submitted in the conjunctive, but these are in support of a *single theory of recovery or defense.*

Research References

West's Key Number Digest
Trial ⚿243

Annotations

In general 1
Dual elements 2
Evidentiary support 3

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1. In general

Verdict directing instructions on fraud claim and on breach of warranty claim that contained multiple representations connected by conjunction "and" did not violate rule prohibiting submission of conjunctive theories of recovery; single theory of fraud and single theory of breach of warranty were supported by series of representations found in single brochure distributed by asbestos manufacturer in connection with fireproofing spray installed in city's airport. *Kansas City v. Keene Corp.*, 855 S.W.2d 360 (Mo.banc 1993).

Since "a theory of recovery or defense should not be submitted unless it can stand alone," it was proper to refuse an instruction submitting two theories where one was incorrect as a matter of law. *Commerford v. Kreitler*, 462 S.W.2d 726 (Mo. 1971).

Error to submit excessive speed and wrong side of the road conjunctively. *Strickland v. Barker*, 436 S.W.2d 37 (Mo. 1969).

Although MAI 1.02 proscribes the submission of dual or multiple theories of defense or recovery in the conjunctive, the court held that the instruction in this case did not submit two alternative independent hypotheses but rather permitted a recovery upon either of two alternative (disjunctive) findings, which is permissible if there is support in the record for each disjunctive hypothesis. The court further held that no essential element of plaintiff's verdict director may be omitted, but an instruction is not erroneous when a finding of the essential element is necessarily implied from the other findings required. *Reed v. Sale Mem'l Hosp. & Clinic*, 698 S.W.2d 931 (Mo.App. S.D. 1985).

Committee Comment to MAI 1.02, conjunctive submissions, declares that every theory of recovery must be supported by evidence. *Hounihan v. State Farm Mut. Auto. Ins.*, 441 S.W.2d 58 (Mo.App. 1969).

Conjunctive submissions of negligence in maintaining defective screen door and defective porch railing erroneous absent evidence to support each submission. *Woods v. Gould*, 515 S.W.2d 592 (Mo.App. 1968).

Error to submit MAI 23.05 hypothesizing two fraudulent submissions conjunctively when there was evidence of only one of them. *Knepper v. Bollinger*, 421 S.W.2d 796 (Mo.App. 1967).

Where plaintiff submitted on (1) primary negligence and (2) humanitarian failure to stop or slacken, each of these elements must be supported by evidence. *Johnson v. Bush*, 418 S.W.2d 601 (Mo.App. 1967).

Affirmative defenses, submitted disjunctively, must each be supported by evidence. *Madison v. Dodson*, 412 S.W.2d 552 (Mo.App. 1967).

Where there are separate verdict directors on each of two theories, each must be supported by evidence. *Toenjes v. L.J. McNeary Constr. Co.*, 406 S.W.2d 101 (Mo.App. 1966).

2. Dual elements

A modified MAI 17.04 submitting that defendant could have avoided the collision if he had "swerved, slackened his speed, swerved and sounded a warning" submitted three separate theories of recovery conjunctively and violated MAI 1.02. *Cook v. Cox*, 478 S.W.2d 678 (Mo. 1972).

Submitting that defendant drove at less than normal speed and failed to drive in the right-hand lane (§ 304.015.5(3), RSMo) was a single theory of recovery composed of dual elements, not a conjunctive submission. *Rooney v. Lloyd Metal Prods. Co.*, 458 S.W.2d 561 (Mo. 1970).

Submitting "slackened his speed, swerved and sounded a warning" was an erroneous conjunctive submission. *Cassin v. Theodorow*, 504 S.W.2d 203 (Mo.App. 1973).

3. Evidentiary support

Every verdict directing instruction, whether plaintiff's or defendant's, must be supported by evidence. *Stotler v. Bollinger*, 501 S.W.2d 558 (Mo.App. 1973).

1.03 [1965 New] Sole Cause Instructions

No instruction shall be given on behalf of the defendant which hypothesizes that the conduct of one other than defendant was the sole cause of the occurrence.

Committee Comment (1981 Revision)

A. There are three reasons for this restriction:

1. Such instructions require the recitation of detailed evidentiary facts and this practice is no longer permitted;
2. The negligence of one other than defendant is properly submitted in the causation element of the verdict director and reference thereto in an additional instruction is confusing and misleading; and
3. The prescribed converse forms adequately present the same defense.

Research References

West's Key Number Digest
Negligence ⚷1741

Legal Encyclopedias
C.J.S., Negligence § 998

Annotations

In general 1
Argument to Jury 4
Intervening cause 3
Skidding 2

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1. In general

Converse instruction adequately covers defense of sole cause. *Birmingham v. Smith*, 420 S.W.2d 514(Mo. 1967).

Although a defendant may *argue* that the action of a third person was the proximate cause of plaintiff's injury, to submit that to a jury would violate MAI 1.03. *Will v. Gilliam*, 439 S.W.2d 498 (Mo. 1969).

The defense of intervening cause is akin to sole cause, and may be submitted only by conversing plaintiff's element of proximate cause. *Gathright v. Pendegraft*, 433 S.W.2d 299 (Mo. 1968).

Submission of instruction providing that verdict must be for railroad on former employee's Safety Appliances and Equipment Act claim if jury believed employee's negligence was sole cause of his injury was error, even though sole cause instruction was permissible under federal law, as instruction was confusing and misleading; Missouri law forbids sole cause instructions, instruction was duplicative, and negligence of employee was properly submitted in verdict director stating that verdict must be for employee if railroad's use of defective coupler mechanism resulted in whole or in part in employee's injury. *Drury v. Mo. Pac. R.R. Co.*, 905 S.W.2d 138 (Mo.App. E.D. 1995).

MAI's 1.01, 1.03, and 1.04 do not preclude the defenses of unavoidable accident, sudden emergency or sole cause, which defenses negated defendant's negligence, but are sufficiently presented by evidence, a converse of plaintiff's verdict director and argument to the jury. *Coffel v. Spradley*, 495 S.W.2d 735 (Mo.App. 1973).

Defendant's verdict director exonerating him if sudden brake failure was sole cause of rear end collision was condemned as a sole cause instruction (MAI 1.03), as a sudden emergency instruction (MAI 1.04) and as an unavoidable accident instruction (MAI 1.01). *Johnson v. Harrington*, 443 S.W.2d 1 (Mo.App. 1969).

2. Skidding

Where plaintiff properly submitted MAI 17. 13, driving on wrong side of the road, and defendant testified she skidded across the center line, it was error to give defendant's affirmative defense instruction exonerating her if she skidded. (This would have been error even had defendant further submitted that her skidding was not negligent.) Such an instruction is akin to an accident instruction condemned by MAI 1.01 and a sole cause instruction condemned by MAI 1.03. Defendant should be limited to conversing negligence by MAI 33.02(2), and then arguing non-negligent skidding. *Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970).

3. Intervening cause

In humanitarian case, a defendant may not present a sole cause defense, but if his evidence supports an intervening cause—as distinguished from a concurring cause—defendant may converse causation by MAI 33.05. *Fowler v. Robinson*, 465 S.W.2d 5 (Mo.App. 1971).

4. Argument to Jury

Although instructions on sole cause are impermissible, defense counsel may argue facts showing collision was solely caused by another's negligence. *Cook v. Cox*, 478 S.W.2d 678 (Mo. 1972).

MAI 1.03 does not prevent a defendant from introducing evidence and arguing that the acts of one other than the defendant were the sole cause of the accident. *Simpson v. Smith*, 771 S.W.2d 368, 372–73 (Mo.App. S.D. 1989).

MAI 1.03 does not prevent defendant from introducing evidence and arguing to jury that the acts of another were the sole cause of collision. *Hoehn v. Hampton*, 483 S.W.2d 403 (Mo.App. 1972).

1.04 [1965 New] Sudden Emergency Instructions

No "sudden emergency" instructions may be given.

Committee Comment (1965 New)

A. Sudden emergency instructions were often given at the request of a party who, prior to the accident, was confronted with an emergency not of his own making. These instructions told the jury that one acting during the emergency is not required to exercise the judgment of one who has time for calm deliberation. The Committee recommended that no such instructions be permitted. There were three reasons for this recommendation:

1. The language is argumentative;
2. The jury has already been instructed that the standard of care is measured by what would be done by others similarly situated; and
3. The instruction may cause reversible error when submitted to cover antecedent negligence not in issue.

Research References

West's Key Number Digest
Negligence ⚷1726

Annotations

1. In general

MAI's 1.01, 1.03, and 1.04 do not preclude the defenses of unavoidable accident, sudden emergency or sole cause, which defenses negated defendant's negligence, but are sufficiently presented by evidence, a converse of plaintiff's verdict director and argument to the jury. *Coffel v. Spradley*, 495 S.W.2d 735 (Mo.App. 1973).

Defendant's verdict director exonerating him if sudden brake failure was sole cause of rear-end collision was condemned as a sole cause instruction (MAI 1.03), as a sudden emergency instruction (MAI 1.04), and as an unavoidable accident instruction (MAI 1.01). *Johnson v. Harrington*, 443 S.W.2d 1 (Mo.App. 1969).

1.05 [1965 New] Physical Facts Instructions

No instruction may be given the substance of which:

(a) informs the jury that they are to take into consideration the physical facts, or

(b) directs the jury to disregard testimony in conflict with the physical facts, or

(c) instructs the jury that any testimony contrary to physical facts shall be given such credit as the jury believes it is entitled to receive.

Committee Comment (1981 Revision)

A. The Committee believes such instructions are pure argument not properly included in the court's instructions. The jurors are already told by MAI 2.01 that they will decide the facts and that the testimony of any witness shall be given such weight and value as they believe it is entitled to receive.

Research References

West's Key Number Digest
Trial ⚷186, 204, 234(1)

1.06 [2012 Revision] Advance Payment or Partial Settlement Instructions

No instruction shall be given directing the jury to credit its verdict with the amount of any undisputed advance payment or partial settlement.

Committee Comment (2012 Revision)

A. This prohibition applies to *undisputed* advance payments and *undisputed* partial settlements. If there is a dispute about such prior payments, see the discussion in the last paragraph of this Committee Comment, MAI 7.02, and form of Verdict MAI 36.19. When disputed, evidence will be adduced at trial and the matter submitted to the jury under appropriately modified instructions and verdict form.

B. Handling of any *undisputed* payment to be credited against plaintiff's claim is a matter of procedure. At the time of the adoption of MAI, the procedure was to advise the jury with respect to any prior settlement payments and to require the jury to deduct that amount from the damages it assessed and return a defendant's verdict if the settlement payment exceeded the plaintiff's damages. Former MAI 7.01 and 7.02, as it existed prior to revision in 1983, accommodated that procedure whether payment was admitted or disputed.

C. In 1972, the legislature adopted a procedure for handling advance payments made under § 490.710, RSMo. This was considered in *Taylor v. Yellow Cab Co.*, 548 S.W.2d 528 (Mo.banc 1977), wherein the court pointed to the logic of making all deductions, whether advance payments or partial settlement payments by joint tortfeasors, a court function:

> If the only purpose of putting the payment in advance on the record was to allow for the reduction of the verdict by that amount, then that result is reached by *simply advising the court of the prior payment* and the court will reduce the verdict accordingly.

Id. at 533 (emphasis added).

D. In considering a settlement payment by a joint tortfeasor in *Taylor*, the court commented:

> In some states this is handled by the court reducing the judgment by the amount of the previous partial settlement rather than the jury doing so. *This may be a better way to handle this situation.*

Id. at 532, n.1 (emphasis added).

E. *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo.banc 1978), raised further questions about the use of former MAI 7.01 and 7.02 as it existed prior to revision in 1983. In apportionment of fault cases, a settling defendant may have paid more than the total amount of compensable damages. Instructing the jury to return a verdict for the nonsettling defendant foreclosed the jury from apportioning fault between the settling and nonsettling tortfeasors even though apportionment of fault may have been applicable in that situation.

F. The former procedure also caused problems in cases in which the nonsettling tortfeasor would have been liable for punitive damages. If plaintiff is seeking punitive damages against the remaining defendant, plaintiff should be entitled to have the jury consider punitive damages if plaintiff has sustained some actual damages even though actual damages may have been covered by the partial settlement already entered. Former MAI 7.01 and MAI 7.02, as it existed prior to revision in 1983, foreclosed this consideration.

G. Requiring the jury to make the subtraction has led to mistakes. The trial court is better equipped to compute the credit. Accordingly, MAI 7.01 and its Notes on Use were withdrawn in 1983 and MAI 7.02 was revised.

H. Under this procedure, the parties should make a record out of the hearing of the jury regarding *undisputed* prior settlement payments made either as an advancement by the defendant or as a partial settlement payment by a joint tortfeasor. The trial judge, as a matter of law, then will take any such prior payments into consideration and will credit them on the damages assessed by the jury's verdict as required by law.

I. If there is a *disputed* issue as to whether there was a settlement payment, as to whether a certain payment was attributable to a settlement, or as to the amount of a settlement payment, this issue is submitted to the jury by modifying the damage instruction as required by current MAI 7.02 and using Form of Verdict MAI 36.19. If evidence of the fact or amount of a settlement is admitted for any other purpose, modify the damage instruction to include the Withdrawal Instruction in MAI 34.05.

Research References

West's Key Number Digest
Damages ⚷210(1)

Annotations

1. In general

Defendants did not waive their right to seek setoff of amount received by plaintiffs in Illinois settlement against Missouri death claim on basis that they failed to offer jury instruction on issue; defendants took position that amount attributable to Missouri death claim from Illinois settlement was not in dispute, and in such a situation it was function of trial court to reduce amount recovered by amount of settlement and no instruction is given to jury. *Walihan v. St. Louis-Clayton Orthopedic Grp., Inc.*, 849 S.W.2d 177 (Mo.App. E.D. 1993).

It is a function of the court to reduce the amount recovered if there has been an advance payment which should be credited to a claim or counterclaim. *Allen v. Foster*, 668 S.W.2d 277 (Mo.App. S.D. 1984).

2.00

EXPLANATORY

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2.00 [2017 Revision] Submissions in Multi-Party or in Multi-Claim Litigation—General Comment

A. The Need for Better Organized Instructions in Complex Litigation

The former MAI system worked well in a simple case where one plaintiff brings one claim against one defendant. As litigation has become more complex, it is not unusual for several plaintiffs and several defendants to be combined in the same lawsuit with the various plaintiffs often making claims for different losses based on differing theories of liability and with the various defendants counterclaiming or maintaining cross-claims or filing third-party petitions for apportionment of fault or asserting other theories of recovery. The former MAI system has been modified and supplemented to meet the needs of such multi-claim litigation.

B. Packaging

Much of the complexity in instructions in such a case results from the large number of instructions necessary to properly submit the case. To aid the jury in understanding and organizing this large number of instructions, the court has adopted a method of arranging and organizing the various instructions in such a case by grouping together the general instructions that apply generally to the overall litigation and placing in separate packages the specific instructions that apply to a particular claim. This system, called "packaging," is to be used as described herein in all cases having more than one verdict form. Such a case (one having more than one verdict form) is referred to herein as a "complex case." The primary purpose of "packaging" is to aid the jury in complex litigation in moving through the instructions and, thus, through their deliberations from one claim to another in an organized and understandable manner. One could describe the concept of "packaging" as a series of mini-sets of instructions, each of which is a subdivision of the overall set of instructions in the case. Once the general instructions that apply to the entire case have been given, each "package" will consist of the remaining instructions applicable to a particular claim followed at the end of the package by the verdict form on which the jury will return its verdict as to that claim.

After the close of the evidence, MAI 2.03, an introductory instruction, is to be given in every case. This is to be followed by all of the instructions that apply generally to more than one claim in the case. This will include the burden of proof instruction, definition instructions of terms used in more than one claim, MAI 2.02 Facts Not Assumed, which is no longer required to be given immediately before the Form of Verdict instruction, and MAI 2.04, which designates the number of claims in a multi-claim case and instructs that nine or more jurors may return a verdict.

The remaining instructions that apply to a particular claim will then be "packaged" by claim. Each of these packages will begin with MAI 2.05, which specifies the particular instructions that apply to the particular claim described therein and refers the jury to the appropriate verdict form. MAI 2.05 will be followed by all of the instructions that apply only to that particular claim. These would include one or more verdict directors, one or more converse instructions if they are used, the appropriate affirmative defense instruction, the damage instruction, and any definitions that are applicable only to this claim. The last page of the package will be the verdict form, which will be designated alphabetically (A, B, C, etc.) rather than numerically. Further packages consisting of MAI 2.05, the other instructions applying to a particular claim, and a further verdict form will make up such other packages as are necessary to submit the case fully in an organized and understandable manner.

The set of general instructions and each package is to be stapled separately or similarly fastened so as not to be readily separated. These packages should then be stacked together in the appropriate order, and the entire set of instructions secured together with a removable fastener such as a paper clip or other appropriate binder clip. The arrangement should be such that the jury can separate the packages if they wish, and each package, except the package of general instructions, will begin with MAI 2.05 and end with a verdict form that the jury will complete.

C. Packaging Not Applicable To "Simple" Cases

"Packaging" is designed to simplify the submission of complex cases. In a simple case, where only one claim is involved, "packaging" is not necessary, and to require its use in such a case would only serve to complicate the system. At the same time, the court does not wish to create a trap for the unwary by drawing technical distinctions as to when "packaging" is or is not required. As discussed in Section E hereof, the basis for "packaging" (by claim or otherwise) is for the determination of the trial judge based on what will present the case to the jury in a manner that will best allow them to consider all the issues in the case in an organized, understandable, and comprehensible manner. If the basis for "packaging" decided upon by the trial court results in two or more packages in addition to the package of general instructions, then the general "packaging" rules for multi-claim cases will apply. A simple and effective way to recognize and describe such a case is that it will be any case in which two or more verdict forms are used (since each package other than the package of general instructions ends with a verdict form). In a case in which there is only one verdict form, there will be only one package containing both the general instructions and all other instructions. In such a case, referred to herein as a "simple" case, the court will give the same general instructions in the same order as is described in Section B above for multi-claim cases. These general instructions will be followed by the other instructions that would otherwise be separately packaged in a multi-claim case except that MAI 2.05 will not be given in a "simple" case. Thus, the single package of instructions in a simple case will begin with MAI 2.01 and end with the verdict form.

In summary, the packaging rules to be followed in multi-claim cases will be modified as follows for the submission of a "simple" case (one containing only one verdict form):

1. MAI 2.04 is to be modified by omitting the first sentence (see bracketed sentence footnoted number 1 in MAI 2.04);

2. MAI 2.05 is not to be given in the "simple" case; and

3. All instructions will be contained in a single package.

D. Numbering

Verdict forms will carry a letter designation rather than a number, i.e., A, B, C, etc. All other instructions will be numbered sequentially beginning with MAI 2.01, which will be Instruction No. 1, and followed by MAI 2.03 numbered Instruction No. 2 and the other general instructions. The numbering will then continue sequentially through the instructions in the various packages so that, for example, in a complex case one package may consist of instructions Nos. 8 through 14 and Verdict Form A and the next package of instructions Nos. 15 through 21 and verdict form B, etc.

E. The Basis for Packaging

Subject to the specific directions set out herein, the trial judge has discretion to determine the order in which the instructions will be given. It will be up to the trial judge to determine the basis for "packaging" of a complex case so that the overall instructions will present the case to the jury in a manner that will best allow them to consider all of the issues in the case in an organized, understandable, and comprehensible manner. In most instances, the case should be packaged so that the claim for damages of each party asserting a claim for damages will be covered by a separate package.

For example, if plaintiff A is claiming damages for personal injuries, all of the instructions applicable to this claim would be included in one package. If plaintiff A is proceeding on alternative theories of negligence and strict liability, the verdict directors for both such theories would be included in the same package. If plaintiff A is making his claim against both defendant X and defendant Y, the verdict directors against both defendants would be included in the package. If these defendants claim that plaintiff A was comparatively negligent, the comparative negligence instruction would also be included in the package. Any other instructions necessary to this claim, such as plaintiff A's damage instruction, would likewise be included in the package.

If defendant X is asserting a counterclaim against plaintiff A for property damage, this would constitute a second claim and would be submitted in a second package. If defendant Y was claiming Apportionment of Fault from defendant X, this would be a third claim and would be submitted in a third package.

While "packaging" based on the claim asserted will be the most common basis upon which most cases will be packaged, there is no rigid requirement as to the criteria for "packaging." It should be done in any manner that will submit the case to the jury in a well-organized, understandable, and comprehensible manner.

F. Describing the Claim Covered by the Package

MAI 2.05, the introductory instruction for each individual package, and the verdict form should include a descriptive phrase that describes and identifies the claim that is being submitted in that package. Since MAI 2.05 limits the intervening instructions to the claim described in MAI 2.05 and submitted in that package, it is not necessary that each instruction in the package contain this descriptive phrase. However, certain instructions in the package may require further identification if they do not apply to the entire claim covered by the package. For example, if the package submits a claim against more than one defendant requiring separate verdict directors for each defendant, the verdict directors must be modified to identify the defendant to which each applies. In such a situation, the first line of the instruction would be changed to read, "Your Verdict must be for plaintiff Jones against defendant Smith if you believe:".

Identifying phrases should be as non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. The following are examples of the types of identifying phrases that are appropriate to describe the claim in the first (MAI 2.05) and last (verdict form) instruction of each package:

. . . on the claim of plaintiff Joe Smith for personal injuries . . .

. . . on the claim of plaintiff Susie Smith for damages as a result of any injury to her husband . . .

. . . on the claim of plaintiff Joe Smith and Susie Smith for property damage . . .

. . . on the claim of defendant John Jones for personal injuries . . .

. . . on the claim of plaintiff Mary Adams for the death of her husband . . . .

If plaintiff claims damages for more than one type of injury in the same package (such as for plaintiff's own personal injuries and for loss of consortium for injuries to plaintiff's spouse) under circumstances where plaintiff may be entitled to recover one type of damage even if not entitled to recover on the other, a description of both claims in the verdict form may be misleading because it may suggest plaintiff cannot recover on either unless plaintiff recovers on both. For example, the verdict form would state, "On the claim of plaintiff for personal injuries and for damages for any injury to plaintiff's spouse, against defendant, we, the undersigned jurors, find in favor of: . . . ." This ambiguity can be avoided by omitting the specific reference to both types of damages so that the verdict form will read, "On the claim of plaintiff against defendant, we, the undersigned jurors, find in favor of: . . . ." The same problem arises when plaintiff seeks damages for both personal injury and property damage.

G. Multiple Theories — Overlapping Damages

In complex litigation with multiple theories of liability (e.g.—commercial litigation), elements of damages under various theories may be identical in some respects, distinct in others, and overlapping in still others. The issue will then arise as to whether multiple theories should be submitted in a single package (with a single damage instruction and a single verdict form) or in separate packages (with a separate damage instruction and a separate verdict form for each theory). The Committee takes no position requiring a particular approach in all such cases. The facts and law applicable to each case will determine the best approach in a given case. The problems to be considered in making the selection of a single package or multiple package approach include the issues of duplicate or overlapping damages, the judgment to be entered if a jury returns damages on more than one theory submitted as separate packages, and the effect of a reversal on appeal on one theory but an affirmance on another. Care should be taken to thoroughly consider the impact of duplicate or overlapping damages under separate theories so that the jury is given adequate guidance on the elements of damages and an appropriate means to express the jury's intent without confusion as to the total judgment to be entered by the trial court. See: Illustration 35.15 for a method of submitting multiple theories in a single package, and MAI 36.02, MAI 36.10, and MAI 36.22 for methods of fashioning a verdict form with categories of damages.

H. Same 9 vs. Different 9

MAI 2.04 instructs a jury that nine or more jurors must agree in order to return any verdict. See article I, § 22(a) of the Missouri Constitution and § 494.490, RSMo 2000.

In *dicta*, the Supreme Court stated that the same nine jurors must agree on all elements necessary for a verdict for or against any particular party. *Stacy v. Truman Med. Ctr.*, 836 S.W.2d 911, 924 (Mo.banc 1992), abrogated on other grounds, *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo.banc 2008). See also *State ex rel. Boyer v Perigo*, 979 S.W.2d 953, 956 (Mo.App. S.D. 1998).

The general rule is not applicable where the jury is required to return more than one verdict. Where there are multiple packages, each with a separate verdict form, a different group of nine jurors can agree to all of the elements of each verdict. *Mackey v. Smith*, 438 S.W.3d 465, 474 (Mo.App. W.D. 2014); *Kemp v. Burlington N. R.R. Co.*, 930 S.W.2d 10, 12 (Mo.App. E.D. 1996). Nine jurors may agree to liability and damages, but a different nine may apportion fault among the defendants. *Powell v. Norman Lines, Inc.*, 674 S.W.2d 191, 199 (Mo.App. E.D. 1984). A different nine also may assess the amount of punitive damages in the second stage of trial under Illustration 35.19 in a bifurcated trial after nine jurors agree on liability, amount of compensatory damages, and liability for punitive damages in the first stage of trial. *Ellison v. O'Reilly Auto. Stores, Inc.*, 463 S.W.3d 426, 439 (Mo.App. W.D. 2015). Jurors who disagree with the remaining jurors on the resolution of one package (verdict) may not be prohibited by jury instructions from deliberating on another package (verdict). To do so would deny the parties the right to a jury of twelve persons deliberating on all issues. *Ellison*, 463 S.W.3d at 440; *Mackey*, 438 S.W.3d at 474; *Powell*, 674 S.W.2d at 199.

See Illustrations 35.02, 35.03, 35.04, 35.05, 35.15, and 35.19 for examples of cases in which packaging is employed to submit multiple claims. On each verdict form within those Illustrations, a different nine may return any verdict in accordance with MAI 2.04.

I. Conclusion

The unique virtue of the MAI system is the recognition that the primary purpose of the instructions in a case is to convey to the jury the law applicable to the case in an understandable, non-argumentative and non-technical manner. "Packaging" is designed to help meet this goal. No rigid set of specific rules can ensure understanding and comprehension for every juror and every type of complex case. "Packaging" is not intended to be a rigid set of rules; it is a tool for lawyers and judges to use with judgment and with consideration for all the facts and circumstances involved in the particular case. If "packaging" is misused as a tool of advocacy to benefit one party and to the detriment of another, it will not serve the purpose for which it is designed. When lawyers and judges use "packaging" in a bona fide effort to present the jury with an organized, understandable, and comprehensible set of instructions, it will serve as a major step forward in improving and perfecting the MAI system to meet the demands of modern litigation.

Annotations

1. In general

Although injured railroad employee had right under Federal Employers' Liability Act (FELA) to plead claim under alternative theories of liability, namely, for general negligence, and for negligence per se arising out of violation of Locomotive Inspection Act, recovery could be had only for single injury, and thus, claim should have been submitted to jury in single package with single verdict form, rather than in separate verdict forms. *Host v. BNSF Ry. Co.*, 460 S.W.3d 87 (Mo.App. W.D. 2015).

A single plaintiff's claim against multiple defendants should generally be contained within a single package. *Oliver v. Ford Motor Credit Co., LLC*, 437 S.W.3d 352 (Mo.App. W.D. 2014).

Single plaintiff's claim against multiple defendants based on multiple theories of liability should generally be contained within a single package of jury instructions. *Mathes v. Sher Express, L.L.C.*, 200 S.W.3d 97 (Mo.App. W.D. 2006).

Where different theories of liability contain distinct elements of damages, separate packages of jury instructions may be appropriate for each liability theory. *Mathes v. Sher Express, L.L.C.*, 200 S.W.3d 97 (Mo.App. W.D. 2006).

Fraudulent misrepresentation jury instruction package should have included actual damage instruction; fact that actual damage instruction was contained in breach of contract package did not cure error, since jury was instructed that damage instruction applied only to breach of contract claim; damage instruction is mandatory in damage suit unless amount of damage is not in dispute. *Dierker Assocs., D.C., P.C. v. Gillis*, 859 S.W.2d 737 (Mo.App. E.D. 1993).

Trial court's decision on whether and how to package jury instructions will not be disturbed without a showing of prejudice; trial court properly refused to submit contractor's default under three surety bonds in separate packages where all claims and defenses were interrelated. *Howard Constr. Co. v. Teddy Woods Constr. Co.*, 817 S.W.2d 556 (Mo.App. W.D. 1991).

Giving the same converse instruction in both packages of instructions in action by automobile passenger and her parents was not error. Such duplication of instructions is necessary so that each claim will contain all of the instructions, except for general instructions, which are necessary for the complete submission of that particular claim. *Seithel v. Clifford*, 689 S.W.2d 91 (Mo.App. E.D. 1985).

As noted in the general comments, packaging is not a rigid set of rules; it is a tool for lawyers and judges to use with judgment and with consideration for all the facts and circumstances involved in a particular case. The burden of showing prejudice by use of the verdict forms in MAI 2.00 rests upon the appellant. *Affiliated Foods Inc. v. Strautman*, 656 S.W.2d 753 (Mo.App. W.D. 1983).

2.00(A) [2014 New] Recommended Explanatory Instruction Before Jury Selection

The trial of a lawsuit involves a considerable amount of time, effort, and expense, and the parties are entitled to have their rights finally determined. The failure on your part to follow the rules and instructions I give to you may result in a miscarriage of justice, and a new trial may be required.

You have been summoned today as prospective jurors for the trial of a civil case. Civil cases begin with the selection of a qualified and impartial jury. You will be asked a series of questions to determine if you have any personal interest in or knowledge of the case that would make it difficult for you to be fair and impartial. The questions asked are not meant to pry into your personal life; they are simply a necessary part of the process of selecting a jury.

Your answers must be truthful and complete. Therefore, please listen to the questions carefully and take your time in answering. If you do not understand a question, raise your hand and it will be clarified. If later in the questioning process you remember something that you failed to mention earlier, raise your hand and let us know.

Following the questioning process, some of you will be chosen as jurors and some will not. Please understand that not being chosen does not reflect on your ability or integrity. You will now take an oath to honestly answer these questions [The panel will be sworn].

The parties have a right to have this case decided only on the evidence presented in this court. You must not conduct your own research or investigation into any issues in this case. You must not attempt to obtain any outside information whatsoever about the case.

You must not comment, discuss, or communicate with anyone, by any means, not even among yourselves, what you hear or learn in trial until the case is concluded and, then, only when all of you are present in the jury room for deliberation of the case under the final instructions I give to you.

During the jury selection process, I want to emphasize that you are not allowed to use any electronic communication devices or the Internet to search for, receive, send, or post any information about the parties, the lawyers, the judge, the witnesses, or any evidence or locations mentioned. Do not discuss or attempt to research what the law may be in this case. This ban applies to all electronic devices, [such as smartphones, lap-tops, or iPads]; all forms of electronic communication, [such as email, text messages, or blogging]; and Internet research tools and social media [like Google, Facebook, or Twitter] *(insert current examples).*

Committee Comment [2014 New]

A. This instruction is not mandatory, but the MAI Committee recommends that this instruction be read to the jury panel before the jury selection process begins. This instruction will not be numbered or given to the jury when it retires to deliberate.

2.00(B) [2021 Revision] Recommended Admonitions at Recess or Adjournment—General Comment

A. Directions or admonitions given by a trial judge to a jury during the course of trial are not instructions. Since directions or admonitions are not instructions, they need not be typed or given to the jury when they retire to the jury room unless the trial court deems it to be appropriate in accordance with subparagraph C. Examples of such directions or admonitions include a direction not to visit the scene of an accident or an oral repetition of the admonition to refrain from discussing the case during a recess. Considerable discretion is afforded to the trial judge, subject to appropriate requests or objections of counsel, to determine the scope and frequency of such directions or admonitions.

B. Directions or admonitions may be derived from parts of MAI 2.01 as may be appropriate under the circumstances of a particular case or may be otherwise fashioned by the court with assistance of counsel. The trial court should make a record of proposed admonitions or directions intended to be given to the jury, and an opportunity should be afforded to counsel to make requests, objections, or other record for appeal.

C. Such directions or admonitions may be used at the beginning of a case, before jury selection, throughout the trial, at each break in trial proceedings, and at the conclusion of each day. The trial court may decide that some directions or admonitions may be best delivered orally, by standardized typed cards for each juror, as a page in juror notebooks, by some combination thereof, or by some other method in the exercise of sound discretion. The Committee does not intend to set rigorous requirements for the use of directions or admonitions, for the frequency of delivery thereof, nor for occasional omission thereof. The guiding principles should always be the efficient administration of justice, fairness to the parties, and imparting to the jury the importance of their individual and group roles in participating in our system of justice.

D. The following directions or admonitions may be of assistance to the bench and bar, but are not intended by the Committee to be mandatory, exclusive, or exhaustive. Other directions or admonitions may also be appropriate under the circumstances of a given case.

(General Recess)

> 1. I will now remind you that you must not talk about any aspect of the trial among yourselves or with anyone else, including the parties, the lawyers, or court personnel. You must keep an open mind and refrain from forming or expressing any opinions on the case. Do not read, view, or listen to any newspaper, radio, or television reports about the trial. Do not do any research or investigation on your own regarding the case, the parties, the witnesses, or the lawyers. Until you are discharged as jurors, the prohibition on electronic communications and Internet use related to the case is in effect.
>
> This ban applies to all electronic devices, [such as smart-phones, lap-tops, or iPads]; all forms of electronic communication, [such as email, text messages, or blogging]; and Internet research tools and social media [like Google, Facebook, Twitter, Snapchat, or Instagram] *(insert current examples)*. You are still free to use electronic communications and the Internet outside of the courtroom, but only for purposes wholly unrelated to this case.
>
> [I again remind you if any of you break these rules, it could result in a miscarriage of justice, and we may have to start the trial all over.]

(General Recess)

> 2. Justice requires that you not make up your mind about the case until all of the evidence has been seen and heard. You must not discuss this case among yourselves or with anyone else or comment on anything you hear or learn in this trial until the case is concluded

and you retire to the jury room for your deliberations. Also, you must not remain in the presence of anyone who is discussing the case when the court is not in session.

[I again remind you if any of you break these rules, it could result in a miscarriage of justice, and we may have to start the trial all over.]

(General Reminder—No Investigation)

3. You must not conduct your own research or investigation into any issues in this case. You must not visit the scene of any of the incidents described in this case. You must not conduct any independent research or obtain any information of any type by reference to any person, textbooks, dictionaries, magazines, the use of the Internet, or any other means about any issues in this case or any witnesses, parties, lawyers, medical or scientific terminology, or evidence that is in any way involved in this trial. You are not permitted to communicate, use a cell phone, record, photograph, video, e-mail, text message, instant message, blog, tweet, or post anything about this trial or your thoughts or opinions about any issue in this case to any other person or to the Internet, "Facebook," "Myspace," "Twitter," or any other personal or public web site during the course of this trial or at any time before the formal acceptance of your verdict by me at the end of the case.

[I again remind you if any of you break these rules, it could result in a miscarriage of justice, and we may have to start the trial all over.]

2.00(C) [2020 New] Juror Bias—Instruction for Use in All Cases—Before Jury Selection

Justice depends on careful and fair decisions based on a conscious and unbiased analysis of the evidence in this case. It is the duty of every juror to determine the facts based upon the evidence presented at trial. Automatic or reflexive responses influenced by conscious or unconscious preconceptions or stereotypes should not enter into that determination. Bias based upon factors such as race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status has no role in the pursuit of justice. Your conclusions in this case should be based on a fair and unbiased consideration of the evidence and respect for the views of other jurors whose backgrounds and perspectives may be different from yours.

Notes on Use (2020 New)

1. This instruction is mandatory and should be read in all civil cases prior to jury selection.

2. This instruction, also contained at MAI 2.03(A), will be re-read to the jury, and given as part of the final instructions in the case, as instruction number 3, immediately after MAI 2.03.

Committee Comment (2020 New)

In 2019, the American Bar Association recommended that a jury instruction be given on implicit bias as part of its Achieving an Impartial Jury project. Pursuant to that recommendation, the Supreme Court of Missouri's Commission on Racial and Ethnic Fairness examined jury instructions on that subject in a number of states and also recommended that such an instruction be considered and adopted in Missouri. MAI 2.00(C) and MAI 2.03(A) are the result of this Committee's analysis of those reports and recommendations.

2.01 [2021 Revision] Instruction for All Cases

(1) GENERAL—JURY INSTRUCTIONS

This instruction and other instructions that I will read to you near the end of the trial are in writing. All of the written instructions will be handed to you for guidance in your deliberation when you retire to the jury room. They will direct you concerning the legal rights and duties of the parties and how the law applies to the facts that you will be called upon to decide.

(2) OPENING STATEMENTS

The trial may begin with opening statements by the lawyers as to the evidence that they expect to present during the trial. What is said in opening statements is not to be considered as proof of a fact. However, if a lawyer admits some fact on behalf of a client, the other party is relieved of the responsibility of proving that fact.

(3) EVIDENCE

After the opening statements, the plaintiff(s) will introduce evidence.[1] The defendant(s) may then introduce evidence. There may be rebuttal evidence after that. The evidence may include the testimony of witnesses who may appear personally in court, the testimony of witnesses who may not appear personally but whose testimony may be read or shown to you and exhibits, such as pictures, documents and other objects.

(4) OBJECTIONS

There may be some questions asked or evidence offered by the parties to which objections may be made. If I overrule an objection, you may consider that evidence when you deliberate on the case. If I sustain an objection, then that matter and any matter I order to be stricken is excluded as evidence and must not be considered by you in your deliberations.

(5) RULINGS OF LAW AND BENCH CONFERENCES

While the trial is in progress, I may be called upon to determine questions of law and to decide whether certain matters may be considered by you under the law. No ruling or remark that I make at any time during the trial will be intended or should be considered by you to indicate my opinion as to the facts. There may be times when the lawyers come up to talk to me out of your hearing. This will be done in order to permit me to decide questions of law. These conversations will be out of your hearing to prevent issues of law, which I must decide, from becoming mixed with issues of fact, which you must decide. We will not be trying to keep secrets from you.

(6) OPEN MINDS AND NO PRELIMINARY DISCUSSIONS

Justice requires that you keep an open mind about the case until the parties have had the opportunity to present their cases to you. You must not make up your mind about the case until all evidence, and the closing arguments of the parties, have been presented to you. You must not comment on or discuss with anyone, not even among yourselves, what you hear or learn in trial until the case is concluded and then only when all of you are present in the jury room for deliberation of the case under the final instructions I give to you.

(7) OUTSIDE INFLUENCES

During the trial you should not remain in the presence of anyone who is discussing the case when the court is not in session. Otherwise, some outside influence or comment might influence a juror to make up his or her mind prematurely and be the cause of a possible injustice. For this reason, the lawyers and their clients are not permitted to talk with you until the trial is completed.

(8) PROHIBITION OF JUROR RESEARCH OR COMMUNICATION ABOUT THIS CASE

Your deliberations and verdict(s) must be based only on the evidence and information presented to you in the proceedings in this courtroom. Rules of evidence and procedure have developed over many years to make sure that all parties in all cases are treated fairly and in the same way and to make sure that all jurors make a decision in this case based only on evidence allowed under those rules and which you hear or see in this courtroom. It would be unfair to the parties to have any juror influenced by information that has not been allowed into evidence in accordance with those rules of evidence and procedure, or to have a juror influenced through the opinion of someone who has not been sworn as a juror in this case and heard evidence properly presented here.

Therefore, I instruct you that you may not conduct your own research or investigation into any issues in this case. You must not visit the scene of any of the incidents described in this case. You must not conduct any independent research or obtain any information of any type by talking to any person, referring to textbooks, dictionaries, magazines, blogs, the Internet, or any other means about any issues in this case, or any witnesses, parties, lawyers, medical or scientific terms, or evidence that is in any way involved in this trial. You are not permitted to communicate, use a cell phone, record, photograph, video, e-mail, blog, tweet, text, or post anything about this trial or your thoughts or opinions about any issue in this case to any other person or to the Internet, “Facebook,” “Myspace,” “Twitter,” “Snapchat,” “Instagram,” or any other personal or public website or any other social media platform during the course of this trial or at any time before my acceptance of your verdict at the end of the case.

If any of you break these rules, this will be a serious breach of your oath as a juror. It could result in a miscarriage of justice, and we may have to start the trial all over.

(9) FINAL INSTRUCTIONS

After all of the evidence has been presented, you will receive my final instructions. They will guide your deliberations on the issues of fact you are to decide in arriving at your verdict.

(10) CLOSING ARGUMENTS

After you have received my final instructions, the lawyers may make closing arguments. In closing arguments, the lawyers have the opportunity to direct your attention to the significance of evidence and to suggest the conclusions that may be drawn from the evidence.

(11) DELIBERATIONS

You will then retire to the jury room for your deliberations. It will be your duty to select a foreperson, to decide the facts and to arrive at a verdict. When you enter into your deliberations, you will be considering the testimony of witnesses as well as other evidence. In considering the weight and value of the testimony of any witness, you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of the case, the relation of the witness to any of the parties, the inclination of the witness to speak truthfully or untruthfully and the probability or improbability of the witness's statements. You may give any evidence or the testimony of any witness such weight and value as you believe that evidence or testimony is entitled to receive.

[Optional Paragraphs (12) and (13): See Committee Comments D & E]

[(12) NOTETAKING

[Each of you may take notes in this case, but you are not required to do so. I will give you notebooks. Any notes you take must be in those notebooks only. You may not take any notes out of the courtroom before the case is submitted to you for your deliberations. No one will read your notes while you are out of the courtroom. If you choose to take notes, do not allow your notetaking to interfere with your ability to observe the evidence and witnesses as they are presented.

Do not discuss or share your notes with anyone until you begin your deliberations. During the deliberations, if you choose to do so, you may use your notes and discuss them with other jurors. Notes taken during trial are not evidence. You should not assume that your notes, or those of other jurors, are more accurate than your own recollection or the recollection of other jurors.

After you reach your verdict your notes will be collected and destroyed. No one will be allowed to read them.][2]

[(13) JUROR QUESTIONS

[After all parties have completed questioning each witness, any juror may anonymously submit written questions to me for my review. You may not ask questions orally or out loud. I may limit the number of questions or revise the form of any question. You must not draw any adverse inference against any party if I decide not to allow one or more of your questions for legal reasons. If I decide to allow any of your questions, I will read them to the witness and allow the witness to answer. I may then allow follow-up questions of that witness by the attorneys.][3]

Notes on Use (2008 Revision)

1. When the facts of the case indicate a reversal of the parties in the order of proof, the instruction reference to plaintiff(s) and defendant(s) must be changed to show the actual order to be followed; i.e., in a case of a claim and counterclaim wherein the claim has been dismissed and the trial proceeds on the counterclaim, the defendant proceeds with evidence ahead of the plaintiff; in condemnation cases, the defendant is first in the order of proof; the trial court has discretion in some cases to vary the order. In will contests where the validity of the entire will or codicil is contested under § 473.083, RSMo, substitute for the first sentence of the third paragraph the sentence, “After the opening statements, the defendant-proponent(s) of the disputed document will present evidence consisting of the formal proof of the document, first.” In will contests challenging only a portion of a will or codicil under § 473.081, RSMo, no such change is necessary.

This instruction shall be read by the trial judge immediately after the jury is sworn and before opening statements of counsel. It is not to be reread by the judge at the conclusion of all the evidence, but it is to be given to the jury with the other written instructions. The attorney for either side may read all or portions of the instruction during closing arguments.

2. If the court allows notetaking by jurors, these bracketed paragraphs should be added.

3. If juror questions are allowed under Rule 69.04, this bracketed paragraph should be given.

Committee Comment (2014 Revision)

A. When MAI 2.01 is read to the jury at the beginning of the case, and when it is given in writing along with the other instructions at the end of the case, it should be given "as is," without further embellishment or explanation by the trial judge.

B. Directions or admonitions:

See MAI 2.00(B).

C. Cell phones, other electronic devices:

The trial court has considerable discretion regarding the use of cell phones or other electronic devices in the courthouse and during trial. Judicial discretion may be exercised by oral admonition, the addition of a paragraph regarding such devices at the end of MAI 2.01, or using a separate instruction.

Other appropriate admonitions or directions to the jury may be formulated and given by the trial judge as determined in light of the particular facts or circumstances of a given case.

See MAI 2.00(B).

D. Juror Note-Taking:

Supreme Court Rule 69.03 provides:

> Upon the court's own motion or upon the request of any party, the court shall permit jurors to take notes. If jurors are permitted to take notes, the court shall supply each juror with suitable materials.
>
> Jurors shall not take their notes out of the courtroom except to use their notes during deliberations.
>
> The court shall collect all juror notes immediately before discharge of the jury.

> After the jury is discharged, the court shall destroy the notes promptly without permitting their review by the court or any other person.
>
> Juror notes shall not be used to impeach a verdict.

E. Juror Questions:

Supreme Court Rule 69.04 provides:

> (a) Upon the court's own motion or upon motion of any party, the court may permit jurors to submit questions to witnesses. The court shall resolve any such motion before the jury is impanelled.
>
> (b) If the court permits jurors to submit questions:
>
> (1) The court shall instruct the jurors:
>
> (A) On the procedure to be followed for asking such questions; and
>
> (B) That no adverse inference is to be drawn against any party if any juror question is not allowed;
>
> (2) After all parties have completed examination of each witness, any juror may submit written, anonymous questions;
>
> (3) All parties shall be given an opportunity outside the hearing of the jurors to object to the substance or the form of any question;
>
> (4) The court may limit the number of questions;
>
> (5) The court may revise any question's form and shall read the question to the witness or the parties may stipulate to the answer; and
>
> (6) The court may allow any party to ask follow-up questions after consideration of the juror questions.

F. Distribution of instructions:

Rule 70.02(f) requires that the final instructions of the court be given to the jury in writing. While Rule 70.02 does not explicitly require that each juror be provided with a copy of the final instructions, such approach is implicitly permitted. In its October 2000 report to the Supreme Court, the Civil Jury Study Committee recommended "that each juror be given a copy of the instructions before instruction reading, final argument, and deliberation." (emphasis supplied.) That committee also noted that juror "understanding increased significantly when each juror received his or her own copy of the instructions." The MAI Committee encourages compliance with this recommendation whenever feasible.

Research References

West's Key Number Digest
Trial 🔑201, 217

Legal Encyclopedias
C.J.S., Trial §§ 295, 296, 318, 320

Annotations

In general 1
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1. In general

The effect of MAI 2.01 is to put jurors on notice that their duty under law is not defined by argument of counsel except to extent counsel admits fact in evidence; instruction undergirds general rule that verdicts should not be set aside on appeal for erroneous argument absent clear abuse of discretion by trial judge. *Tune v. Synergy Gas Corp.*, 883 S.W.2d 10 (Mo.banc 1994).

Medical malpractice and wrongful death plaintiffs' objections to argument of defendant medical center, which argument could have been allegedly construed as stating that jury could only consider particular evidence and not other evidence, were properly overruled; trial court admonished jurors that they heard evidence and ruling on objections and were instructed to consider only those facts still alive at trial, and trial court gave jury general instruction that jurors could consider all evidence except what had been withdrawn because trial court had sustained objections. *Vititoe v. Lester E. Cox Med. Ctrs.*, 27 S.W.3d 812 (Mo.App. S.D. 2000).

2. Omissions

Omitting clause from Par. 8 of MAI 2.01 was presumptively prejudicial. *Chapman v. Bradley*, 478 S.W.2d 873 (Mo.App. 1972).

Omission of "reasonable inference" and "relationship of the witness" clauses from MAI 2.01 is prejudicial error. *McCory v. Knowles*, 478 S.W.2d 682 (Mo.App. 1972).

Omitting the reasonable-inference clause and the relationship-of-witness-to-party clause was presumptively prejudicial. *City of Jackson v. Barks*, 476 S.W.2d 162 (Mo.App. 1972).

3. Criminal cases

MAI 2.01 properly refused in criminal case since MAI applies only to civil cases. *State v. Bohlen*, 487 S.W.2d 543 (Mo. 1972).

4. Hammer instruction

Error to give "hammer" instruction requiring jury to reach verdict by agreement of the whole jury is error, but harmless where there was 9-to-3 verdict. *Garner v. Jones*, 589 S.W.2d 66 (Mo.App. W.D. 1979).

Hammer instruction may be given after submission of case to jury, but MAI-CR 1.10 is inappropriate in a civil trial where the verdict need not be unanimous. *Cowan v. McElroy*, 549 S.W.2d 543 (Mo.App. 1977).

5. Deviation

Trial court's interpretative embellishment of MAI 2.01 reversible error by violating Rule 72.02(b) excluding other instructions. *Washington v. Sears, Roebuck & Co.*, 585 S.W.2d 137 (Mo.App. E.D. 1979).

6. Modification

Modification not required to have defendant proceed first. *Truck Ins. Exch. v. Hunt*, 590 S.W.2d 425 (Mo.App. S.D. 1979).

7. Juror Misconduct

Fact that juror used internet search engine to locate information about weather on date of incident did not require a new trial in premises case. *Smotherman v. Cass Regional Medical Center*, 499 S.W.3d 709 (Mo.banc 2016).

2.02 [1980 Revision] Facts Not Assumed

In returning your verdict[s] you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Notes on Use (1980 Revision)

This instruction must be given once and only once in every case.

It may be given in such order as the trial court shall deem advisable. However, in multi-claim submission cases, it should be given along with the other explanatory instructions early in the sequence of instructions as part of the package of general instructions. See MAI 2.00 General Comment.

Committee Comment (1980 Revision)

A. This instruction reduces the chances of a jury improperly concluding that a controverted fact has been assumed by the court to be true. See *Ogilvie v. Kansas City Pub. Serv. Co.*, 27 S.W.2d 733, 735 (Mo.App. 1930); *Allen v. Purvis*, 30 S.W.2d 196, 201 (Mo.App. 1930).

B. Similar instructions have been approved in *Greenwood v. Wiseman*, 305 S.W.2d 474, 476 (Mo. 1957), and in *Potter v. Sac-Osage Electric Cooperative, Inc.*, 335 S.W.2d 192, 199 (Mo. 1960).

C. The first sentence is intended to clarify the function of this instruction.

Research References

West's Key Number Digest
Trial ⚷191

Annotations

1. In general

Where issue was whether roadway was public or had become private by non-use, it was error for instruction to refer to it as a public road. *Terhune v. Caton*, 487 S.W.2d 19 (Mo. 1972).

Whether contributory negligence instruction confused jury by improperly assuming controverted fact is tested by principle of "reasonable men" construction. *Kewanee Oil Co. v. Remmert-Werner, Inc.*, 508 S.W.2d 23 (Mo.App. 1974).

2.03 [2005 Revision] Order of Instructions

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Notes on Use (1980 New)

This instruction is to be given in every case as the first instruction after the close of the evidence. It should be numbered Instruction Number 2 following MAI 2.01 which is Instruction Number 1.

Committee Comment (2005 New)

A. For cases addressing the issue of what words and phrases should be defined in instructions, see: *Steffens v. Paramount Props., Inc.*, 667 S.W.2d 725, 727 (Mo.App. E.D. 1984); *Huff v. Union Elec. Co.*, 598 S.W.2d 503, 510 (Mo.App. E.D. 1980).

Research References

West's Key Number Digest
Trial ⚷217

Legal Encyclopedias
C.J.S., Trial §§ 296, 318, 320

2.03(A) [2020 New] Juror Bias—Instruction for Use in All Cases

Justice depends on careful and fair decisions based on a conscious and unbiased analysis of the evidence in this case. It is the duty of every juror to determine the facts based upon the evidence presented at trial. Automatic or reflexive responses influenced by conscious or unconscious preconceptions or stereotypes should not enter into that determination. Bias based upon factors such as race, sex, gender, gender identity, religion, national origin, ethnicity, disability, age, sexual orientation, or marital status has no role in the pursuit of justice. Your conclusions in this case should be based on a fair and unbiased consideration of the evidence and respect for the views of other jurors whose backgrounds and perspectives may be different from yours.

Notes on Use (2020 New)

1. This instruction is identical to MAI 2.00(C) which was initially read to the panel before jury selection.

2. This instruction must be read to the jury again and included in the final instructions at the close of the case as instruction number 3 immediately following MAI 2.03.

Committee Comment (2020 New)

In 2019, the American Bar Association recommended that a jury instruction be given on implicit bias as part of its Achieving an Impartial Jury project. Pursuant to that recommendation, the Supreme Court of Missouri's Commission on Racial and Ethnic Fairness examined jury instructions on that subject in a number of states and also recommended that such an instruction be considered and adopted in Missouri. MAI 2.00(C) and MAI 2.03(A) are the result of this Committee's analysis of those reports and recommendations.

2.04 [1981 Revision] Return of Verdict

[There are ________ claims submitted to you and each of them contains a separate verdict form.][1] The verdict form[s] included in these instructions contain[s] directions for completion and will allow you to return the permissible verdict[s] in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Notes on Use (1980 New)

1. The bracketed sentence should be used only in multi-claim cases (those having two or more verdict forms). See MAI 2.00 General Comment.

This instruction must be given in every case. In multi-claim cases, it should be given along with the other explanatory instructions as part of the package of general instructions.

Committee Comment (2017 New)

A. MAI 2.04 instructs a jury that nine or more jurors must agree in order to return any verdict. See article I, § 22(a) of the Missouri Constitution and § 494.490, RSMo.

B. In *dicta*, the Supreme Court stated that the same nine jurors must agree on all elements necessary for a verdict for or against any particular party. *Stacy v. Truman Med. Ctr.*, 836 S.W.2d 911, 924 (Mo.banc 1992), abrogated on other grounds, *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo.banc 2008). See also *State ex rel. Boyer v Perigo*, 979 S.W.2d 953, 956 (Mo.App. S.D. 1998).

C. The general rule is not applicable where the jury is required to return more than one verdict. Where there are multiple packages, each with a separate verdict form, a different group of nine jurors can agree to all of the elements of each verdict. *Mackey v. Smith*, 438 S.W.3d 465, 474 (Mo.App. W.D. 2014); *Kemp v. Burlington N. R.R. Co.*, 930 S.W.2d 10, 12 (Mo.App. E.D. 1996). Nine jurors may agree to liability and damages, but a different nine may apportion fault among the defendants. *Powell v. Norman Lines, Inc.*, 674 S.W.2d 191, 199 (Mo.App. E.D. 1984). A different nine also may assess the amount of punitive damages in the second stage of trial under Illustration 35.19 in a bifurcated trial after nine jurors agree on liability, amount of compensatory damages, and liability for punitive damages in the first stage of trial. *Ellison v. O'Reilly Auto. Stores, Inc.*, 463 S.W.3d 426, 439 (Mo.App. W.D. 2015). Jurors who disagree with the remaining jurors on the resolution of one package (verdict) may not be prohibited by jury instructions from deliberating on another package (verdict). To do so would deny the parties the right to a jury of twelve persons deliberating on all issues. *Ellison*, 463 S.W.3d at 440; *Mackey*, 438 S.W.3d at 474; *Powell*, 674 S.W.2d at 199.

D. See Illustrations 35.02, 35.03, 35.04, 35.05, 35.15, and 35.19 for examples of cases in which packaging is employed to submit multiple claims. On each verdict form within those Illustrations, a different nine may return any verdict in accordance with MAI 2.04.

Research References

West's Key Number Digest
Trial ⚷215, 217

Legal Encyclopedias
C.J.S., Trial §§ 296, 315, 318, 320

Annotations

1. In general

Verdict form providing for one set of jurors' signatures, as well as jury instructions that "nine or more of you [jurors] must agree in order to return any verdict," adequately advised jury in wrongful death action that same nine jurors should have agreed on same element, act of negligence, causation, and amount of damages. *Stacy v. Truman Med. Ctr.*, 836 S.W.2d 911 (Mo.banc 1992).

2.05 [1980 New] Multi-Claim Submissions—Designation of Applicable Instructions

Instructions ________[1] through ________[2] and general instructions 1 through ________[3] apply to the claim of *(here insert party and designation of claim such as "plaintiff Joe Smith for personal injury")*.[4] Use Verdict ________ to return your verdict on this claim.

Notes on Use (1980 New)

1. Insert the number of the present instruction which will be the first instruction in this package.

2. Insert the number of the instruction immediately preceding the verdict form in this package.

3. Insert the number of the last instruction in the first package which is the package containing general instructions.

4. This instruction should contain a descriptive phrase which describes and identifies the claim submitted by this particular package. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

In multi-claim cases the instructions will be "packaged." See MAI 2.00 General Comment and Illustrations in Chapter 35 in this regard. MAI 2.05 is to be used as the first instruction for each such "package" after the package of general instructions and will be used as many times as there are such "packages" in the complete set of instructions. MAI 2.05 is not to be given in cases using only one verdict form. In such a case only one package will be used; it will contain both general and other instructions. See MAI 2.00 General Comment, Section C.

Research References

West's Key Number Digest
Trial ⚷215

Legal Encyclopedias
C.J.S., Trial § 315

Annotations

1. In general

Error in modifying the instruction to have jury direct one party's claims first and to disregard further instructions if it found in favor of such party, even though modification was an attempt to avoid inconsistent verdicts; inconsistent verdicts are to be addressed by the giving of MAI 2.06. *B.A. Sales, Inc. v.*

Murray, 274 S.W.3d 475 (Mo.App. S.D. 2008).

Trial court correctly included fire insurer's affirmative defense instruction in each package of claims by insureds, even though insureds claimed that doing so resulted in improper multiple submission of affirmative defense of arson. *Joiner v. Auto-Owners Mut. Ins. Co.*, 891 S.W.2d 479 (Mo.App. W.D. 1994).

2.06 [2006 Revision] Inconsistent or Erroneous Verdict

The court cannot accept your verdict[s] as written because *(here insert a brief description why the verdict(s) is (are) inconsistent, incomplete, ambiguous, or otherwise erroneous.)* [A] [N]ew verdict form[s] is [are] attached for your use, if needed. Do not destroy any of the verdict forms.

Notes on Use (2006 Revision)

This instruction may be given if the jury attempts to return an inconsistent, incomplete, ambiguous or otherwise erroneous verdict. The court should identify each of the new verdict forms submitted with this instruction with an appropriate designation such as "Second Set."

Research References

West's Key Number Digest
Trial ⚷339, 358, 359, 362

Legal Encyclopedias
C.J.S., Trial §§ 601, 667, 668, 669, 655 to 658

Annotations

1. In general

If a jury has returned an inconsistent verdict and a party requests that the jury be further instructed and given the opportunity to correct their verdict, a new trial must be granted if the court fails to so instruct the jury before discharging it. *Lindahl v. State*, 359 S.W.3d 489 (Mo.App. W.D. 2011).

When a trial court sends a jury back for further deliberations because it has returned inconsistent verdicts, the jury instruction on deliberations following inconsistent verdicts applies. *Braboy v. Fed. Express Corp.*, 238 S.W.3d 690 (Mo.App. E.D. 2007).

When a trial court sends a jury back for further deliberations because it has returned inconsistent verdicts, instruction on deliberations following inconsistent verdicts is mandatory. *Franklin v. Allstate Ins. Co.*, 985 S.W.2d 893 (Mo.App. W.D. 1999).

In suit by injured union members against union local and its former president arising out of former president's assault of them following union election, trial court's error in refusing local union's request that jury be returned to their deliberations for correction of its verdict warranted reversal and remand for new trial on issue of compensatory damages only; though former president's acts of willfulness and local union's negligence were separate and independent, they were joint tortfeasors insofar as injuries caused were single and indivisible, and jury should have been given other forms of verdicts patterned after MAI 36.05, to allow a single verdict and single amount of compensatory damages for each plaintiff. *Fincher v. Murphy*, 825 S.W.2d 890 (Mo.App. W.D. 1992).

Seller of computer and software system waived any error based on inconsistency of verdict on its claim for payment of balance of purchase price and in favor of buyer on its claims for breach of warranty and conversion, where seller did not ask for, and objected to, any possibility that jury be instructed to deliberate further. *Clayton X-Ray Co. v. Prof'l Sys. Corp.*, 812 S.W.2d 565 (Mo.App. W.D. 1991).

MAI 2.06 was properly utilized to re-submit case to jury after return of an ambiguous verdict with regard to the amount of damages where the jury used the words "One Million Eight Hundred Eighty." A verdict is not final unless it is submitted to the court, accepted by the court, assented to by the jury, and recorded. An ambiguous, inconsistent, or otherwise defective verdict may be resubmitted to the jury to give an opportunity to correct it or render a new verdict. On resubmission, the jury returned a verdict for $1,880,000.00. *Parker v. Midwestern Distribution, Inc.*, 797 S.W.2d 721 (Mo.App. E.D. 1990).

2.07 [2012 New] Explanatory—Insurance, Benefits

The existence or non-existence of any type of insurance, benefit, right or obligation of repayment, public or private, must not be considered or discussed by any of you in arriving at your verdict. Such matters are not relevant to any of the issues you must decide in this case.

Committee Comment (2014 Revision)

A. This is not a mandatory instruction. In some cases it may be appropriate, in the discretion of the trial judge, to give the instruction as part of the general instruction packet. In other cases, it may be more appropriate to reserve this instruction as a response to a question by the jury during deliberations.

B. There may also be cases in which this instruction would not be appropriate, such as bad faith insurance cases, vexatious refusal to pay cases, and insurance coverage cases. There may be other situations in which this instruction would not be appropriate.

C. The Committee suggests that the trial court and counsel discuss (on the record), during the instruction conference, any issue pertaining to insurance and/or benefits, and the proper scope of argument to the jury on these issues. Since such a discussion is not mandatory, appropriate and timely objections must still be made. However, such a discussion may help clarify issues and reduce the number of interruptions during closing arguments.

D. The existence or use of this instruction is not intended to limit the trial court's discretion in ruling on motions in *limine* or controlling closing arguments.

Annotations

1. In general

Trial court appropriately exercised its discretion to include an instruction patterned after MAI 2.07 based upon "the totality of the entire case, the evidence presented, to which there was either no objection or to which an objection was overruled." *Rider v. The Young Men's Christian Association of Greater Kansas City*, 460 S.W.3d 378 (Mo.App. W.D. 2015).

3.00

BURDEN OF PROOF

3.01 General
3.02 Eminent Domain [Withdrawn 2008]
3.03 Will Contest [Withdrawn 2012]
3.04 Clear and Convincing—Gift
3.05 Libel or Slander—Plaintiff a Public Official or Public Figure
3.06 Libel or Slander—Punitive Damages Sought by a Plaintiff Not a Public Official or Public Figure
3.07 Clear and Convincing—Commitment for Mental Illness
3.08 Paternity Actions

Research References

West's Key Number Digest

Eminent Domain 🔑200; Gifts 🔑47(1); Libel and Slander 🔑101(1); Mental Health 🔑7; Parent and Child 🔑205(1), 205(2), 229; Trial 🔑205; Wills 🔑288(1)

A.L.R. Library

A.L.R. Index, Eminent Domain; Gifts; Instructions to Jury; Libel and Slander; Paternity; Wills

West's A.L.R. Digest, Eminent Domain 🔑200; Gifts 🔑47(1); Libel and Slander 🔑101(1); Mental Health 🔑7; Parent and Child 🔑205(1), 205(2), 229; Trial 🔑205; Wills 🔑288(1)

Legal Encyclopedias

Am. Jur. 2d, Eminent Domain §§ 516, 517; Gifts §§ 75, 76; Libel and Slander § 510; Wills § 814

C.J.S., Children Out-of-Wedlock § 110; Eminent Domain § 459; Gifts § 86; Mental Health § 268; Wills §§ 21, 769, 771, 772, 773

3.01 [2016 Revision] General

Your verdict will depend on the facts you believe after considering all the evidence. The party who relies upon any disputed fact has the burden to cause you to believe that such fact is more likely true than not true. In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

[There is a different burden of proof that applies only to punitive damages.[1] A party seeking to recover punitive damages has the burden to cause you to believe that the evidence has clearly and convincingly established the facts necessary to recover punitive damages.][2]

Notes on Use (1998 Revision)

1. Substitute the phrase "damages for aggravating circumstances" for the phrase "punitive damages" if aggravating circumstances are submitted under MAI 6.02 in a wrongful death case.

2. Add bracketed material if punitive damages or damages for aggravating circumstances are submitted. See *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo.banc 1996).

A burden of proof instruction must be given in every case. MAI 3.01 is to be used except where another burden of proof instruction has been provided.

Committee Comment (1981 Revision)

A. It is no longer necessary to modify the instruction to specifically refer to the burden of proof on an affirmative defense or a counterclaim because the second sentence of the instruction covers each party's burden of proof.

Research References

West's Key Number Digest
Trial 🔑205

Annotations

Affirmative defense 2
Deviation 1
Directed verdict 10
Fraud 4
Invited error 3

Malicious prosecution 8
Mandatory 7
Modification 6
New Trial 11
Third-method converse 5
Wrongful death 9

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1. Deviation

Improper use of "his" instead of "her" was error but not prejudicial where identity of female plaintiff was apparent to the jury; instruction was "substantially correct." *Gormly v. Johnson*, 451 S.W.2d 45 (Mo. 1970).

Error to depart from MAI 3.01 (burden of proof) by using pre-MAI language. *Pasternak v. Mashak*, 428 S.W.2d 565 (Mo. 1967).

Slight error in burden-of-proof instruction harmless when clarified by verdict director, to which it referred by number. *Bauser v. DeNoble*, 412 S.W.2d 409 (Mo. 1967).

Inadvertent use of prior approved burden of proof instruction after effective date of 1998 Revision, did not misstate the law, was not prejudicial to plaintiff, and, thus, did not justify award of new trial to plaintiff. Jury was told both in voir dire and closing argument that plaintiff had burden of causing jury to believe that a proposition was more likely true than not true, there was no indication that jury was confused or misunderstood plaintiff's burden of proof, plaintiff did not consider error sufficiently prejudicial at time of discovery to request proper instruction, and case was argued at all times as though proper instruction had in fact been given. *Hill v. Hyde*, 14 S.W.3d 294 (Mo.App. W.D. 2000).

Defendant driver's closing argument, that MAI 3.01 did not mention anything about 51%, was a proper clarifying response to plaintiff driver's closing argument that she only had to tip the scales in her favor by 51% to be entitled to judgment, and did not constitute plain error. *Williams v. Jacobs*, 972 S.W.2d 334 (Mo.App. W.D. 1998).

When reviewing cases for instructional error resulting from deviation from Missouri Approved Instructions (MAI) format, it is role of court to determine whether erroneous instruction caused prejudicial effect, and no judgment will be reversed on account of instructional error unless error materially affected merits of case. *Porta-Fab Corp. v. Young Sales Corp.*, 943 S.W.2d 686 (Mo.App. E.D. 1997).

Burden is on party who offered erroneous instruction that deviated from Missouri Approved Instruction (MAI) format to show on appeal that erroneous instruction created no substantial potential for prejudicial effect. *Porta-Fab Corp. v. Young Sales Corp.*, 943 S.W.2d 686 (Mo.App. E.D. 1997).

While deviation from the use of MAI constitutes error, it falls to the courts to judicially determine the prejudicial effect, if any, thereof, the burden of proving that there was no prejudice falling upon the proponent of the instruction. Where defendants suffered no prejudice as a result of adding the term "or defense" to the burden of proof instruction where there was no affirmative defense issue submitted to the jury, there was no prejudicial error. *Affiliated Foods, Inc. v. Strautman*, 656 S.W.2d 753 (Mo.App. W.D. 1983).

Use of singular instead of plural forms held harmless error in view of other proper instructions. *Penn v. Columbia Asphalt Co.*, 513 S.W.2d 679 (Mo.App. 1974).

2. Affirmative defense

Insurer bears burden of proof on affirmative defense that insured failed to comply with policy condition. *Nichols v. Preferred Risk Grp.*, 44 S.W.3d 886 (Mo.App. S.D. 2001).

Inclusion of phrase "or defense" in MAI 3.01 was error where no affirmative defense was raised, but the error was harmless since the instruction, viewed in light of totality of instructions indicated that plaintiff still had the burden of proof. *Wilson v. Lockwood*, 711 S.W.2d 545 (Mo.App. W.D. 1986).

Trial court committed prejudicial error in giving a separate burden of proof instruction as to an affirmative defense where MAI 3.01 already had been submitted. *Begley v. Werremeyer Assocs., Inc.*, 638 S.W.2d 817 (Mo.App. E.D. 1982).

Defendant has burden of proving affirmative defenses of release or payment. *Winter v. Elder*, 492 S.W.2d 146 (Mo.App. 1973).

3. Invited error

Plaintiff may not complain of omission in his own burden-of-proof instruction. *Blankenship v. Kansas City Terminal Ry. Co.*, 462 S.W.2d 650 (Mo. 1971).

4. Fraud

Burden of proof in fraud case is no greater than other cases, and defendant was not entitled to an instruction requiring clear, cogent and convincing evidence. *Crawford v. Smith*, 470 S.W.2d 529 (Mo.banc 1971); *Artilla Cove Resort, Inc. v. Hartley*, 72 S.W.3d 291 (Mo.App. S.D. 2002).

Burden of proof in a fraud case tried to a jury is no greater than in any other case tried to a jury, and the proper burden of proof instruction is MAI 3.01; thus, bankruptcy order could have collateral estoppel effect on subsequent common law fraud action, which had same burden of proof. *Hartsfield v. Barkley*, 856 S.W.2d 342 (Mo.App. E.D. 1993).

5. Third-method converse

Instructions accurately portrayed burden of proof in action brought by creditor to recover business debt, where jury was instructed that burden of causing jury to believe proposition of fact was upon party who relied on proposition, and defendant's converse verdict director, as modified by trial judge, instructed jury to find for defendant if plaintiff was unsuccessful in proving that defendant had any ownership interest in business. *Petry Roofing Supply, Inc. v. Sutton*, 839 S.W.2d 337 (Mo.App. E.D. 1992).

MAI 3.01 need not be modified to meet defendant's burden of proof or affirmative converse instruction. *Rest. Indus., Inc. v. Lum's Inc.*, 495 S.W.2d 668 (Mo.App. 1973).

6. Modification

Where defendant's claim to an inter vivos gift was made after alleged donor's death, the burden of proof instruction should be modified to require that evidence of gift must be by clear, cogent, and convincing proof. *Matter of Passman's Estate*, 537 S.W.2d 380 (Mo.banc 1976).

7. Mandatory

MAI 3.01 is mandatory. *Sears, Roebuck & Co. v. Peerless Prods., Inc.*, 539 S.W.2d 768 (Mo.App. 1976).

8. Malicious prosecution

MAI 3.01 is proper burden of proof instruction in civil malicious prosecution case. *Proctor v. Stevens Emp't Servs., Inc.*, 712 S.W.2d 684 (Mo.banc 1986).

9. Wrongful death

Wrongful death defendant's closing argument reference to conviction for murder did not warrant setting aside of verdict in favor of defendant on ground that jury might have been misled into applying burden of proof in criminal case, which was greater than burden applied in civil cases; objection to comment was sustained, no comment about burden of proof imposed in criminal case was made to jury, and court properly instructed jury on burden of proof in civil cases. *McPherson v. David*, 805 S.W.2d 260 (Mo.App. W.D. 1991).

10. Directed verdict

Trial court should not withdraw case from jury unless all of evidence is so strongly against plaintiffs as to leave no room for reasonable minds to differ; if it is determined that reasonable minds could differ, it is incumbent upon judge to let case go to jury, who will then be instructed as to party bearing burden of proof and persuasion. *Friend v. Holman*, 888 S.W.2d 369 (Mo.App. W.D. 1994).

11. New Trial

Adoption of approved pattern instruction, requiring jury to 'believe' hypothesis necessary to warrant verdict for plaintiff, has not changed rule as to sufficiency of evidence in connection with granting motion for new trial. *Clark v. Quality Dairy Co.*, 400 S.W.2d 78 (Mo. 1966).

3.02 [2008 Withdrawn] Eminent Domain

Historical Note

(MAI 3.02 (1981 Revision) and its related Notes on Use and Committee Comment have been withdrawn. All instructions and Illustrations relating to Eminent Domain have been collected in Chapter 9 of MAI — Civil. MAI 3.02 has been replaced by MAI 9.03 (2008 New)).

3.03 [2012 Withdrawn] Burden of Proof—Will Contest

Historical Note

(MAI 3.03 and its related Notes on Use and Committee Comment have been withdrawn. All instructions and illustrations related to Will Contests have been collected in Chapter 15 of MAI Civil. MAI 3.03 has been replaced by MAI 15.03 (2012 Revision)).

3.04 [2017 Revision] Clear and Convincing—Gift

Your verdict will depend on the facts you believe after considering all the evidence. The burden is upon *(insert name of alleged donee)* to cause you to believe by clear and convincing evidence that the *(describe the property such as "bonds")* were a gift to [him, her] by the decedent. In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

Committee Comment (2017 Revision)

A. This instruction is to be used in those cases where the proof must be "clear and convincing" or "clear, cogent and convincing." See *Matter of Passman's Estate*, 537 S.W.2d 380 (Mo.banc 1976). These cases usually involve the issue of whether a gift was made *(inter vivos or causa mortis)*. Some of the gift cases before *Passman* called for "clear, [cogent] and convincing proof to convince the jury *beyond a reasonable doubt.*" *Id.* at 381. In *Passman*, the court held that a special burden of proof instruction is required, but it rejected the argument that the modification must include "reasonable doubt" language. *Id.*

B. If the proposition to be established is other than a gift, the language of the first sentence of the instruction should be modified accordingly.

C. If there is an affirmative defense or a counterclaim that has a different burden of proof than the clear and convincing standard, the instruction should be modified accordingly. See MAI 3.06 and MAI 3.08 for a method of submitting different burdens of proof for different issues within the same instruction.

Research References

West's Key Number Digest
Gifts ⚷47(1)

Legal Encyclopedias
C.J.S., Gifts § 86

Annotations

1. In general

In action for fraud and undue influence in connection with transfer of bank account, court properly instructed jury that plaintiff's burden of proof was "clear and convincing evidence." *McMullin v. Borgers*, 806 S.W.2d 724 (Mo.App. E.D. 1991).

3.05 [2017 Revision] Libel or Slander—Plaintiff a Public Official or Public Figure

Your verdict will depend on the facts you believe after considering all the evidence.

The burden is on plaintiff to cause you to believe, by clear and convincing evidence, that:

a. the *(describe the alleged defamatory statement, such as "newspaper article," "statement," etc.)* referred to in the evidence was false; and

b. that defendant *(describe the act of publication, such as "published the newspaper article," "wrote the letter," etc.)* with knowledge that it was false or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true.

There is a different burden of proof on all other facts. On those other facts, the party who relies on any disputed fact has the burden to cause you to believe that such fact is more likely true than not true.

In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

Notes on Use (1989 Revision)

A burden of proof instruction must be given in every case.

Committee Comment (1980 New)

A. The Missouri courts recognize that the federal cases require that the actual malice standard set forth in *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), must be proved by clear and convincing evidence. *Whitmore v. Kansas City Star Co.*, 499 S.W.2d 45 (Mo.App. 1973), discussing *New York Times v. Sullivan, supra, Curtis Publishing Company v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), and *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971). See also *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), appeal after remand 680 F.2d 527 (7th Cir. 1982).

Research References

West's Key Number Digest
Libel and Slander ⚷101(1)

Annotations

1. In general

Verdict directing instruction should have been submitted in action by employee against former employer for allegedly defamatory communication to other employees and customer that employee was terminated for stealing company money; employer's communications to other employees and customer were protected by qualified privilege, but employee made submissible case of actual malice to defeat that privilege. *Deckard v. O'Reilly Auto., Inc.*, 31 S.W.3d 6 (Mo.App. W.D. 2000).

3.06 [2017 Revision] Libel or Slander—Punitive Damages Sought by a Plaintiff Not a Public Official or Public Figure

Your verdict will depend on the facts you believe after considering all the evidence. The party who relies upon any disputed fact has the burden to cause you to believe that such fact is more likely true than not true. In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

There is a different burden of proof that applies only to punitive damages as submitted in the second paragraph of Instruction Number ____ *(insert the number of the damage instruction, which will be MAI 4.15)*. The plaintiff has the burden to cause you to believe that the evidence has clearly and convincingly established the facts necessary to recover punitive damages.

Notes on Use (1989 Revision)

This burden of proof instruction is for use where a private plaintiff (not a public official or public figure) seeks both actual and punitive damages. If a private plaintiff does not seek punitive damages, use MAI 3.01 as the burden of proof instruction.

Committee Comment (1980 New)

A. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), holds that the *New York Times* standard of actual malice must be met for the recovery of punitive damages. The Missouri courts recognize that the federal cases require that the actual malice standard of *New York Times* be proved by clear and convincing evidence. *Whitmore v. Kansas City Star Co.*, 499 S.W.2d 45 (Mo.App. 1973).

Research References

West's Key Number Digest
Libel and Slander ⚷101(1)

3.07 [2017 Revision] Clear and Convincing—Commitment for Mental Illness

Your verdict will depend on the facts you believe after considering all the evidence. The burden is upon petitioner to cause you to believe by clear and convincing evidence that respondent is mentally ill and, as a result, presents a likelihood of serious physical harm to [himself] [herself] or others. In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

Committee Comment (1983 New)

A. This instruction is meant for use in a hearing governed by the civil detention procedures for a person suffering from a mental illness. A finding must be based upon clear and convincing evidence. §§ 632.300 to 632.475, RSMo.

Research References

West's Key Number Digest
Mental Health ⚷7

Legal Encyclopedias
C.J.S., Mental Health § 268

3.08 [1998 Revision] Paternity Actions

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon plaintiff to cause you to believe that the propositions necessary to support the claim(s) as submitted in Instruction(s) Number ________ [and Number ________ *(here insert number(s) of plaintiff's verdict director(s))*] are more likely to be true than not true. [The burden is upon the defendant to cause you to believe that the evidence has clearly and convincingly established those propositions necessary to support his claim as submitted in Instruction Number ________ *(here insert number of defendant's MAI 31.20 submission)*].[1] In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Notes on Use (1994 New)

1. Add this bracketed sentence only if the case is submitted under MAI 31.19 and the putative father submits a rebuttal of the statutory presumption under MAI 31.20.

Committee Comment (2017 Revision)

A. The bracketed sentence submits the appropriate burden of proof in accordance with § 210.822.2, RSMo, in a case where the defendant submits evidence and an instruction to rebut the statutory presumption. It should be used only if the defendant submits MAI 31.20 to rebut a statutory presumption. The burden of proof to support the presumption or to otherwise support the plaintiff's claim remains on the plaintiff. § 210.822.2, RSMo, does not shift the burden of proof; rather, it places a separate and different burden on the defendant if he or she submits a rebuttal to the presumption.

B. MAI 3.08, MAI 31.18, MAI 31.19, MAI 31.20, and MAI 36.28 were drafted for civil paternity actions under §§ 210.817 *et seq.*, RSMo. Effective July 1, 1987, § 210.839.4, RSMo, was amended to provide that no party in such a paternity action has a right to trial by jury. The Committee has chosen not to withdraw or revise these instructions and the related verdict form in the event that they are instructive or perhaps useful in the future since the Supreme Court has held that the Parentage Act (§§ 210.817 *et seq.*) is not the exclusive means to determine paternity. *Matter of Nocita*, 914 S.W.2d 358 (Mo.banc 1996); see MAI 3.01 (2016 Revision).

Research References

West's Key Number Digest
Children Out-of-Wedlock 🔑205(1); Parent and Child 🔑205(2), 229

Legal Encyclopedias
C.J.S., Children Out-of-Wedlock § 110

4.00

DAMAGES—GENERAL

4.01 Personal and Property
4.02 Property Only
4.03 Property—Misrepresentation
4.04 Quantum Meruit
4.05 Broker's Commission—Agreed Percentage
4.06 Broker's Commission—No Amount Agreed
4.07 Action to Recover for Services Furnished Decedent
4.08 Contract—When Substantial Performance Submitted
4.09 Amount Not in Dispute
4.10 Ejectment [Withdrawn 2012]
4.11 Damages Uninsured Motor Vehicle—Suit Against Insurer Only [Withdrawn 2012]
4.12 Apportionment of Fault—Plaintiff Claiming Against All From Whom Apportionment Is Sought—Plaintiff's Claim and Apportionment Decided in Same Trial
4.13 Apportionment of Fault—Plaintiff Not Claiming Against All From Whom Apportionment of Fault Is Sought—Plaintiff's Claim and Apportionment Decided in Same Trial
4.14 Apportionment of Fault—Separate Trial
4.15 Libel or Slander—Plaintiff Not a Public Official or Public Figure
4.16 Libel or Slander—Plaintiff a Public Official or Public Figure
4.17 Breach of Warranty Under Uniform Commercial Code—Accepted Goods
4.18 Personal Injury and Loss of Consortium, Loss of Services or Medical Expenses—Spouse or Child Injured—Non-Comparative Fault Only

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Research References

West's Key Number Digest

Brokers ⚷88(13); Damages ⚷210(1), 216(1), 217, 218; Ejectment ⚷110; Executors and Administrators ⚷451(3); Insurance ⚷2772, 2816; Libel and Slander ⚷124(8); Negligence ⚷1746; Products Liability ⚷420

A.L.R. Library

A.L.R. Index, Brokers; Damages; Ejectment, Eviction, and Ouster; Instructions to Jury; Libel and Slander; Quantum Meruit

West's A.L.R. Digest, Brokers ⚷88(13); Damages ⚷210(1), 216(1), 217, 218; Ejectment ⚷110; Executors and Administrators ⚷451(3); Insurance ⚷2772, 2816; Libel and Slander 🔑124(8); Negligence 🔑1746; Products Liability 🔑420

Legal Encyclopedias

Am. Jur. 2d, Damages § 826; Ejectment § 41; Libel and Slander § 486; Restitution and Implied Contracts § 89

C.J.S., Brokers §§ 363, 364, 367; Damages §§ 431, 434, 436, 437; Ejectment § 199; Products Liability § 282; Sales § 517; Trial § 850

4.01 [2002 Revision] Personal and Property

If you find in favor of plaintiff,[1] then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][2] as a direct result of the occurrence[3] mentioned in the evidence. [If you find that plaintiff failed to mitigate damages as submitted in Instruction Number ——, in determining plaintiff's total damages you must not include those damages that would not have occurred without such failure.][4]

Notes on Use (2002 Revision)

1. If there is a counterclaim, add the words "on plaintiff's claim for damages".

2. This may be added if supported by the evidence.

3. When the evidence discloses a compensable event and a noncompensable event, both of which are claimed to have caused damage, the term "occurrence" may need to be modified. See *Vest v. City Nat'l Bank & Trust Co.*, 470 S.W.2d 518 (Mo. 1971). When the term "occurrence" is modified, substitute some descriptive phrase that specifically describes the compensable event or conduct. As an example, if the plaintiff claims plaintiff sustained damages as a direct result of negligent medical care while being treated for a non-compensable fall or illness, the instruction may be modified to read, ". . . as a direct result of the conduct of defendant as submitted in Instruction Number ________ *(here insert number of verdict directing instruction)*." As another example, if plaintiff sustained damages in an automobile collision but also had a non-compensable illness, the instruction may be modified to read ". . . as a direct result of the automobile collision."

In a case such as *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo.banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the occurrence mentioned in the evidence" from MAI 4.01 and substitute the phrase "that *(describe the compensable event or conduct)* directly caused or directly contributed to cause."

Other modifications also may be appropriate.

4. If failure to mitigate damages is submitted, this instruction must be modified by adding this bracketed sentence. See MAI 32.29 for the appropriate method of submission of failure to mitigate damages in cases other than FELA. For FELA cases, use MAI 24.04(A) and MAI 24.07.

This instruction should not be used in a comparative fault case. See MAI 37.03 for the damage instruction in a comparative fault case, and MAI 21.04 for the damage instruction in a comparative fault case involving health care providers.

See MAI 21.03 for the damage instruction in a case involving health care providers without comparative fault.

Committee Comment (2002 Revision)

A. This instruction is short, simple, and easily understood. Since no particular items of damage are set out, there is no risk of the jury being improperly instructed on damages not supported by the record.

B. During the instruction conference, the parties and the court should discuss (on the record) what damages are supported by the evidence and can properly be argued to the jury. In this way, jury arguments can proceed without undue interruptions.

C. Rule 71.06 requires the jury verdict to separately state the amounts awarded for personal injuries and property damage.

D. In the past, varied approaches have been suggested for the manner of instructing on the issue of mitigation of damages. For example, the opinion in *Love v. Park Lane Med. Ctr.*, 737 S.W.2d 720 (Mo.banc 1987), suggested using a comparative fault approach. The product liability statute, § 537.765, RSMo, also could be read to suggest a comparative fault approach. *Tillman v. Supreme Express & Transfer, Inc.*, 920 S.W.2d 552 (Mo.App. E.D. 1996), seemed to indicate that MAI 6.01 is the correct approach, although it also observed that MAI 6.01 is limited to wrongful death cases.

E. In fact, rather than the doctrine of avoidable consequences, MAI 6.01 submits a completely different type of mitigation (mitigating circumstances attendant upon the fatal injury in a wrongful death case pursuant to § 537.090, RSMo). *Tillman* also rejected the comparative fault approach to mitigation of damages. In order to avoid potential inconsistencies in alternative methods of submission (comparative fault approach in some cases, the FELA approach in other cases, and yet other possible approaches in other cases), the Committee has concluded that it is best to adopt a uniform approach to the submission of the doctrine of mitigation of damages in all cases as reflected in MAI 32.29 and the revision of MAI 4.01. This approach is both legally and logically correct and consistent with the approach already taken in FELA cases (See MAI 24.04(A) and MAI 24.07). It is also in compliance with the mandate of § 537.765, RSMo, that failure to mitigate damages "shall diminish proportionately the amount awarded as compensatory damages . . ."; thus, the method of submission of mitigation of damages in a product liability case should utilize the approach taken in MAI 32.29 and MAI 4.01.

Research References

West's Key Number Digest
Damages 🔑217

Annotations

In general 1
"Occurrence" 4
Breach of contract 8
Conversing damages 5
Conversion 14
Deviation 2
Diminution of value 7
Direct result 17
Fraud 13
Future damage 6
Missouri Merchandise Practices Act 18
Modification 3
Multiple defendants 10
Multiple injuries 11
Multiple plaintiffs 9
Nuisance 15
Quantum meruit 12
Waste 16

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1. In general

Recovery for medical monitoring damages is consistent with a touchstone of Missouri law, the principle that a plaintiff is entitled to full compensation for past or present injuries caused by the defendant. *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712 (Mo.banc 2007).

A plaintiff is entitled to full compensation for past or present injuries that the plaintiff has shown by a preponderance of the evidence were caused by the defendant. *Swartz v. Gale Webb Transp. Co.*, 215 S.W.3d 127 (Mo.banc 2007).

Where plaintiff sought damages for a November 9, 1966, back injury and his evidence showed two earlier back injuries, MAI should have been modified by deleting the words "mentioned in evidence" and substituting therefor the words "of November 9, 1966." Plaintiff's verdict director should have been similarly modified. *Russell v. Terminal R.R. Ass'n of St. Louis*, 501 S.W.2d 843 (Mo.banc 1973).

In using MAI 4.01 it is contemplated that closing arguments will properly advise the jury as to the elements of and proper measure of damages. Arguments are subject to objections made at instruction conference and during course of argument. *Boten v. Brecklein*, 452 S.W.2d 86 (Mo. 1970).

Even though plaintiff's physician improperly diagnosed her condition, her MAI 4.01 was adequate and she was not entitled to another instruction that defendant was liable for damages flowing from misdiagnosis. *Aubuschon v. Witt*, 412 S.W.2d 136 (Mo. 1967).

Property damage only instruction, rather than instruction relating to personal and property damage, was proper instruction for submitting question of damages in contract and warranty suit against elevator installation and service company for improper maintenance and repair of elevators in trustee's building, given highlighted titles of two instructions and notes on use for property damage only instruction. *Dubinsky v. U.S. Elevator Corp.*, 22 S.W.3d 747 (Mo.App. E.D. 2000).

Jury instruction on personal and property damages should only be given where there has been damage to both the person and property. *Kelley v. Kelly Residential Grp., Inc.*, 945 S.W.2d 544 (Mo.App. E.D. 1997)

Use of modified version of approved instruction used in cases involving personal and property damage was proper in breach of warranty action by bank against company that improperly installed uninterruptible power supply system for bank's computers, inasmuch as bank sought recovery and provided evidence of expenses proximately related to property damage, including costs for employee to work through weekend to enable repairs to computers by next business day, and modification to instruction properly encompassed damages reasonably expected by installer when it performed its services. *St. John's Bank & Trust Co. v. Intag, Inc.*, 938 S.W.2d 627 (Mo.App. E.D. 1997).

In absence of more narrowly applicable instruction, MAI 4.01 is correct damage instruction in breach of contract actions. *Metro Waste Sys., Inc. v. A.L.D. Servs., Inc.*, 924 S.W.2d 335 (Mo.App. E.D. 1996).

Trial court erred in giving MAI 4.01, applicable when both personal injury and property damages are claimed, in insurance contract action alleging coverage for collapse of retaining wall in which only property damage was claimed; MAI 4.02 should have been given instead. *Pace Props., Inc. v. Am. Mfrs. Mut. Ins. Co.*, 918 S.W.2d 883 (Mo.App. E.D. 1996).

Deficiency in damage instruction of failure to advise jury that judge would reduce plaintiff's recovery by percentage of plaintiff's fault was not prejudicial error where verdict form disclosed to the jury the court's role in determining the actual damages awarded to plaintiff. *Wheeler v. Evans*, 708 S.W.2d 677 (Mo.App. W.D. 1986).

In an action by a discharged employee against his union for failing to fairly represent him in his complaint for wrongful discharge against his employer, MAI 4.01 was the proper instruction to use and the court properly excluded from the instruction such matters as the apportionment between union and employer, such being matters left to jury argument. *Osborne v. Warehouse, Mail Order, Ice, Cold Storage*, 666 S.W.2d 822 (Mo.App. W.D. 1984).

The giving of MAI 4.01 twice, following the verdict directors on both contract and tort claims arising out of a singular act, constituted prejudicial error. *Ross v. Holton*, 640 S.W.2d 166 (Mo.App. E.D. 1982).

MAI 4.02 is not applicable where the damages sought include items not measurable by before and after value or by cost of repair. Thus reasonable expenses proximately resulting from damage to property, although usually recoverable, do not fall within MAI 4.02, and were properly charged under MAI 4.01. *Stegan v. H.W. Freeman Constr. Co., Inc.*, 637 S.W.2d 794 (Mo.App. E.D. 1982).

Giving MAI 4.01 in property damage-only case is prejudicial error warranting a new trial. *Wright v. Edison*, 619 S.W.2d 797, 800 (Mo.App. E.D. 1981).

In bailment action, where property was returned but in damaged condition, proper damage instruction was MAI 4.02 based on before-and-after values, not MAI 4.01. *Emcasco Ins. Co. v. Auto Driveaway Co.*, 586 S.W.2d 780 (Mo.App. W.D. 1979).

Where plaintiff's recovery was based only on diminution of property value, giving MAI 4.01 instead of MAI 4.02 was error. *Sands v. R.G. McKelvey Bldg. Co.*, 571 S.W.2d 726 (Mo.App. 1978).

Alternative damage instructions discussed in buyers' suit against seller for cost of repairing latent defects. *Matulunas v. Baker*, 569 S.W.2d 791 (Mo.App. 1978).

Different elements of damage, including offset, need not be particularized in damage instruction; explanation to be made in oral argument. *Morgan v. Wartenbee*, 569 S.W.2d 391 (Mo.App. 1978).

Where evidence showed an earlier similar injury, it was error to give MAI 4.01 without modifying it to limit damages to the injury in dispute. *Wagoner v. Hurt*, 554 S.W.2d 587 (Mo.App. 1977).

Giving defendant's pre-MAI instruction that an award to plaintiff was not subject to income tax was an impermissible "improvement" on MAI and prejudicial error. *Senter v. Ferguson*, 486 S.W.2d 644 (Mo.App. 1972).

Generality of plaintiff's MAI 4.01 cannot be raised by defendant who fails to offer a more specific instruction. *Epperson v. Nolan*, 452 S.W.2d 263 (Mo.App. 1970).

Defendant was not entitled to an instruction detailing the elements of damage the jury should not consider. *Jurgeson v. Romine*, 442 S.W.2d 176 (Mo.App. 1969).

Where defendant admits liability, but not injuries, it is error to instruct jury to return verdict in favor of plaintiff. *Watts v. Handley*, 427 S.W.2d 272 (Mo.App. 1968).

Generality in plaintiff's MAI 4.01 cured by defendant's failure to offer a more specific damage instruction. *Miller v. Ranson & Co.*, 407 S.W.2d 48 (Mo.App. 1966).

2. Deviation

Omitting the word "direct" in MAI 4.01 is presumptively prejudicial. *Brown v. St. Louis Pub. Serv. Co.*, 421 S.W.2d 255 (Mo.banc 1967).

Omission of "as a direct result of the occurrence mentioned in evidence" in MAI 4.01 was reversible error. Not corrected by the damage requirement in plaintiff's verdict director since the two instructions conflicted. *Chappell v. City of Springfield*, 423 S.W.2d 810 (Mo. 1968).

Where there is a counter-claim, plaintiff's damage instruction must add the words "on plaintiff's claim for damages," and failure to do so is presumptively reversible error. *Duren v. Dougherty*, 585 S.W.2d 527 (Mo.App. W.D. 1979).

Where there was no issue as to the amount of plaintiff's damages, the error in omitting the last clause of MAI 4.01 "as a direct result of the occurrence" was harmless. *Nu-Way Servs., Inc. v. Mercantile Trust Co.*, 530 S.W.2d 743 (Mo.App. 1975).

3. Modification

Where new trial was had on issue of damages only and liability and causation were no longer in issue, MAI 4.01 was inapplicable and was properly modified by deleting the opening words "If you find the issues in favor of the plaintiff, then . . . ." *Reynolds v. Arnold*, 443 S.W.2d 793 (Mo. 1969).

"Reasonable men" construction applied to modified MAI 4.01. *Stewart v. Sioux City & New Orleans Barge Lines, Inc.*, 431 S.W.2d 205 (Mo. 1968).

Even if damage instruction was improperly modified by modifying the word "occurrence" in MAI 4.01, no prejudice was shown, particularly where no special objection to instruction on that ground was presented. *Ray v. Upjohn Co.*, 851 S.W.2d 646 (Mo.App. S.D. 1993).

Modification of MAI 4.01 is required where the evidence discloses more than one event that is claimed to have caused plaintiff's injuries. Even though an instruction deviates from the MAI, there is a trend away from reversal unless there is a substantial indication of prejudice. *Grady v. Am. Optical Corp.*, 702 S.W.2d 911 (Mo.App. E.D. 1985).

Because MAI 4.01 does not provide for damages that were reasonably contemplated by defendant at the time it warranted its work, the court remanded for retrial on issue of damages and recommended that MAI 4.01 be modified to properly state the law for recovery in action based on breach of warranty of workmanlike performance. *Crank v. Firestone Tire & Rubber Co.*, 692 S.W.2d 397 (Mo.App. W.D. 1985).

Where there was no evidence that two or more occurrences contributed proportionately to the plaintiff's injury but rather that plaintiff was injured either by the occurrence of a negligently administered hip spinal as contended by plaintiff or by a faulty embolism as contended by defendant, only one event or occurrence is claimed to have caused plaintiff's injury and an unmodified MAI 4.01 damage instruction was proper. However, verdict director was found to be reversible error because it assumed facts in dispute. *Yoos v. Jewish Hosp. of St. Louis*, 645 S.W.2d 177 (Mo.App. E.D. 1982).

Modification of MAI 4.01 to describe an obligation sued on as a "debt" instead of "damages" was not prejudicial, nor was the substitution of the description of the unpaid debt for the word "occurrence," the court finding that such substitution could not have been injurious to plaintiff. *Owen v. Owen*, 642 S.W.2d 410 (Mo.App. S.D. 1982).

Where one of three defendants settled with plaintiff, MAI 4.01, as mandated by MAI 7.01, note 2, was properly modified by changing "award" to "determine," so as to show deduction of plaintiff's partial settlement. *Smith v. Courter*, 575 S.W.2d 199 (Mo.App. 1978). (MAI 7.01 was withdrawn in 1983. Now see MAI 7.02).

Where plaintiff was injured in collision with defendant, and due to that injury he was further injured in a second collision, MAI 4.01 was properly modified to allow damages for both injuries. *Ponciroli v. Wyrick*, 573 S.W.2d 731 (Mo.App. 1978).

Where there is evidence of damage caused by extraneous acts, MAI 4.01 should be modified to limit recovery to damage caused by defendant. *N. Cty. Sch. Dist. R-1 v. Fid. & Deposit Co. of Md.*, 539 S.W.2d 469 (Mo.App. 1976).

Giving defendant's pre-MAI instruction that an award to plaintiff was not subject to income tax was an impermissible "improvement" on MAI 4.01 and prejudicial error. *Senter v. Ferguson*, 486 S.W.2d 644 (Mo.App. 1972).

Where plaintiff's medical evidence showed treatment for another similar injury just three weeks previous to injury on trial, it was error to give MAI 4.01 without modifying the phrase "occurrence mentioned in evidence;" this in accordance with Notes on Use, which must be followed. *Homm v. Oakes*, 453 S.W.2d 679 (Mo.App. 1970).

Prior to MAI 4.04 on damages in quantum meruit, in action for services rendered it was not error to give a not-in-MAI damage instruction allowing a sum that would "fairly, reasonably and justly compensate plaintiff". *McAtee v. Greenspon*, 439 S.W.2d 187 (Mo.App. 1969).

Modified damage instruction on suit for fixed commission. *Bomson v. Electra Mfg. Co.*, 402 S.W.2d 7 (Mo.App. 1966).

4. "Occurrence"

Two defendant motorists were jointly and severally liable for plaintiff's injuries received in separate collisions. Separate MAI 4.01's each referred to "the occurrence" mentioned in evidence. In view of their joint liability, neither defendant was prejudiced by each instruction referring to "occurrence" in the singular. *Barlow v. Thornhill*, 537 S.W.2d 412 (Mo.banc 1976).

Where plaintiff sought damages for a November 9, 1966, back injury and his evidence showed two earlier back injuries, MAI should have been modified by deleting the words "mentioned in evidence" and substituting therefor the words "of November 9, 1966." Plaintiff's verdict director should have been similarly modified. *Russell v. Terminal R.R. Ass'n of St. Louis*, 501 S.W.2d 843 (Mo.banc 1973).

Where defendant doctors in malpractice action could be liable for only part of plaintiff's injuries, MAI 4.01 should have been modified by substituting some descriptive term for the word "occurrence;" this to comply with Notes on Use. *Vest v. City Nat'l Bank & Trust Co.*, 470 S.W.2d 518 (Mo. 1971).

The term "occurrence," as used in MAI 4.01, refers to defendant's wrongful act. *Cook v. Newman*, 142 S.W.3d 880 (Mo.App. W.D. 2004).

MAI 4.01, which included reference to damages sustained as result of "occurrence mentioned in the evidence," was appropriate, even though self-insured employer sought damages for only property damage, and not personal injury, in action against insurance brokers for obtaining stop-loss medical policy with active-at-work provision. *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386 (Mo.App. E.D. 1998).

MAI 4.01, instructing jury to award such sum as it believes will fairly and justly compensate plaintiff for damages which plaintiff sustained and is reasonably certain to sustain in future as direct result of occurrence, rather than MAI 9.02, addressing eminent domain damages for taking of part of property, is appropriate when damage goes beyond mere property loss. *Shady Valley Park & Pool, Inc. v. Fred Weber, Inc.*, 913 S.W.2d 28 (Mo.App. E.D. 1995).

Second collision case involving enhanced leg injuries to a motorcyclist as a result of a defective fairing bracket following a motor vehicle collision. The damage instruction was properly submitted without modification of the word "occurrence" even though the manufacturer claimed that there were separate occurrences involving the original collision and then the enhanced leg injury caused by the fairing bracket. Plaintiff was only required to show that fairing bracket was a substantial factor in producing leg injuries and was not required to show that lesser injuries would have resulted from safer design. *McDowell v. Kawasaki Motors Corp. USA*, 799 S.W.2d 854 (Mo.App. W.D. 1990).

In an action to recover damages for a sprained ankle, modification of the damage instruction to include a reference to a prior ankle injury suffered by the customer was not necessary where the store owner failed to prove that the past injury had not healed prior to the accident in the store. *Burns v. Schnuck Mkts., Inc.*, 719 S.W.2d 499 (Mo.App. E.D. 1986).

Failure to modify instruction on damages under MAI 4.01, which submitted only "the occurrence mentioned in the evidence," was not prejudicial, where plaintiff pleaded only the collapse of surface of parking lot as the cause of her injuries and where her verdict directing instruction submitted only that event as a basis for recovery, even though plaintiff testified that she also sustained injuries in incidents which occurred after the collapse of the parking lot. However, it would have been better practice to modify the instruction. *Asher v. Broadway-Valentine Ctr., Inc.*, 691 S.W.2d 478 (Mo.App. W.D. 1985).

Where evidence shows but a single indivisible injury that may be the result of a combination of tortious acts of a defendant and others, it is not reversible error to fail to modify the word "occurrence" in MAI 4.01. *Koenig v. Babka*, 682 S.W.2d 96, 99 (Mo.App. E.D. 1984).

The jury having been supplied a separate set of instructions for each claim, each instruction format serving to segregate each "occurrence" with the set of instructions including the verdict director applicable to it, a jury of normal intelligence could not have entertained any confusion as to what occurrence was involved and therefore explicit definition of "occurrence" was not required. *Essex v. Getty Oil Co.*, 661 S.W.2d 544 (Mo.App. W.D. 1983).

Plaintiff sued for neck injuries received in a collision and testified to later injuries to her arm and ankle. Error to give unmodified MAI 4.01. *Thweatt v. Haefner*, 539 S.W.2d 734 (Mo.App. 1976).

Where plaintiffs submitted one count for conversion and another for wrongful ejectment, both on the same date, plaintiffs' MAI 4.01's were erroneous by each referring to "the occurrence of October 29." Defendant invited the error by agreeing to the trial court's oral explanation of the two instructions. *Fletcher v. Cummings*, 532 S.W.2d 890 (Mo.App. 1976).

Where plaintiff had an earlier back injury not attributable to defendant, it was error to give MAI 4.01 without modification of "occurrence." *Clark v. McCloskey*, 531 S.W.2d 36 (Mo.App. 1975).

Where both verdict directors were based on damages *after* January 5, it was necessary to modify damage instruction MAI 4.02 to include evidence of *prior damage* since instructions are read together. *Goodwin v. S.J. Groves & Sons Co.*, 525 S.W.2d 577 (Mo.App. 1975).

Where plaintiff's medical evidence showed treatment for another similar injury just three weeks previous to injury on trial, it was error to give MAI 4.01 without modifying the phrase "occurrence mentioned in evidence;" this in accordance with Notes on Use, which must be followed. *Homm v. Oakes*, 453 S.W.2d 679 (Mo.App. 1970).

Where water damage to plaintiff's crops was caused by defendant's obstructing a creek and also by natural flooding, MAI 4.01 should have been modified by omitting the word "occurrence" and using instead the phrase "the obstruction across the creek." *Jurgeson v. Romine*, 442 S.W.2d 176 (Mo.App. 1969).

Where rain damage to plaintiff's house was only partly caused by the defendant, plaintiff's MAI 4.01 should have been modified by changing the word "occurrence" to a more descriptive term that would limit recovery to damages for which the defendant was liable. This, in accord with the Notes on Use of MAI 4.01. *Miller v. Am. Ins. Co.*, 439 S.W.2d 238 (Mo.App. 1969).

In MAI 4.01, the word "occurrence" refers to the defendant's wrongful act, and that act need not be further described. *Nelson v. R.H. Macy & Co.*, 434 S.W.2d 767 (Mo.App. 1968).

The word "occurrence" in MAI 4.01 should be used in the singular unless the injury was produced by more than one occurrence. *Gant v. Scott*, 419 S.W.2d 262 (Mo.App. 1967).

5. Conversing damages

Where court gave defendant's instruction 33.02(5) (withdrawn 1980) conversing damages, it was error to give an additional converse on the same subject. *McBee v. Schlupbach*, 529 S.W.2d 435 (Mo.App. 1975).

A measure of damage instruction as distinguished from the damage element of plaintiff's verdict director may not be conversed. *City of Gladstone v. Hamilton*, 463 S.W.2d 622 (Mo.App. 1971).

6. Future damage

Trial court erred by excluding future damages clause from MAI 4.01 while allowing future damages to be argued to jury by former employee in wrongful discharge action; if future damages were supported by record, then they should have been both instructed on and argued. *Brenneke v. Dep't of Mo., Veterans of Foreign Wars of U.S.A.*, 984 S.W.2d 134 (Mo.App. W.D. 1998).

Future damages may not be submitted if they are not supported by the evidence. *Fincher v. Murphy*, 825 S.W.2d 890 (Mo.App. W.D. 1992).

Where plaintiff testified that after recovery from injury she was *unable to find work*, it was proper to give an instruction withdrawing that evidence. *Abraham v. Johnson*, 579 S.W.2d 734 (Mo.App. S.D. 1979).

Future pain and suffering must be supported by evidence but that evidence need not show *permanent* injury. *Chaussard v. Kansas City S. Ry. Co.*, 536 S.W.2d 822 (Mo.App. 1976).

In FELA case, where defendant contended plaintiff's correct future damage instruction should be limited to "present value," defendant must offer such a limiting instruction. *Chaussard v. Kansas City S. Ry. Co.*, 536 S.W.2d 822 (Mo.App. 1976). (Now see MAI 8.02).

To warrant future damage clause, it is sufficient to show the sudden onset of pain and its continuation to time of trial; no need for corroborating medical evidence. *Jones v. Allen*, 473 S.W.2d 763 (Mo.App. 1971).

Evidence that pains began at time of accident and persisted until trial time warranted inclusion of future damage clause. *Pryor v. Am. Oil Co.*, 471 S.W.2d 492 (Mo.App. 1971).

Plaintiff need not show permanency of injuries to be entitled to submit future damages clause. *Gaynor v. Horwitz*, 464 S.W.2d 537 (Mo.App. 1971).

Evidence supported future damage clause. *Young v. Frozen Foods Express, Inc.*, 444 S.W.2d 35 (Mo.App. 1969).

Future damage clause in MAI 4.01 must have evidentiary support. *Kramer v. May Lumber Co.*, 432 S.W.2d 617 (Mo.App. 1968).

Insertion of future damage clause in MAI 4.01 is error absent medical opinion or evidence of sudden onset of defect continuing to time of trial. *Harrison v. Weller*, 423 S.W.2d 226 (Mo.App. 1967).

Future damage clause in MAI 4.01 must be supported by substantial evidence. *Zoeller v. Terminal R.R. Ass'n of St. Louis*, 407 S.W.2d 73 (Mo.App. 1966).

7. Diminution of value

In suit to recover damages for permanent nuisance, the correct measure of damages is based on before-and-after values and is improperly submitted by MAI 4.01. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970).

Property damage was properly submitted by MAI 4.01, and a not-in-MAI before-and-after value instruction was properly refused since MAI 4.01 is adequate in view of evidence and argument on before-and-after values. *Jack L. Baker Cos. v. Pasley Mfg. & Distrib. Co.*, 413 S.W.2d 268 (Mo. 1967).

Plaintiff's verdict of $4,500 damages to its building was adequately supported by evidence of $2,400 for repairs and $5,000 diminution of value. *Yellow Serv. Co. Inc. v. Human Dev. Corp. of St. Louis*, 539 S.W.2d 713 (Mo.App. 1976).

Where plaintiffs sought damages for flooding their property, MAI 4.02 was the proper damage instruction, and giving MAI 4.01 was error warranting the new trial granted. *Ogle v. Terminal R.R. Ass'n of St. Louis*, 534 S.W.2d 809 (Mo.App. 1976).

In action for damage to building, MAI 4.02, not MAI 4.01, was the proper damage instruction. *DeArmon v. City of St. Louis*, 525 S.W.2d 795 (Mo.App. 1975).

Where plaintiff's damage was only to property, it was prejudicial error to give MAI 4.01 instead of MAI 4.02. *State ex rel. State Highway Comm'n v. Beaty*, 505 S.W.2d 147 (Mo.App. 1974).

MAI 4.01 properly submits issues of diminution in value or cost of replacement whichever is less. *Hounihan v. State Farm Mut. Auto. Ins.*, 441 S.W.2d 58 (Mo.App. 1969).

In damage suit for breach of house repair contract where evidence showed both (1) the diminution of value and (2) the cost of repairs, MAI 4.01 was proper, and it was not error to refuse a specific measure of damage instruction calling for the lesser of (1) and (2). *Stamm v. Reuter*, 432 S.W.2d 784 (Mo.App. 1968).

In permanent nuisance case, sole damage issue was diminution of value, like condemnation cases; MAI 9.02 was proper and MAI 4.01 improper. *Stewart v. City of Marshfield*, 431 S.W.2d 819 (Mo.App. 1968).

Not-in-MAI damage instruction approved although based on before-and-after values of damaged truck. *Cameron v. Va. Sur. Co.*, 423 S.W.2d 219 (Mo.App. 1967).

Points to need for separate MAI 4.01 on property value before and after. *Dettler v. Santa Cruz*, 403 S.W.2d 651 (Mo.App. 1966).

8. Breach of contract

MAI 4.01 properly used in breach of contract case, subject to defendants' right to offer a more specific instruction. *Boten v. Brecklein*, 452 S.W.2d 86 (Mo. 1970).

MAI 4.01 properly used in a breach of contract action. *Gottlieb v. Hyken*, 448 S.W.2d 617 (Mo. 1970).

Buyers, in action for breach of contract to sell chiropractic practice, were not prejudiced by inclusion of elective language pertaining to future damages in approved jury instruction, since jury did not award future damages. *Dierker Assocs., D.C., P.C. v. Gillis*, 859 S.W.2d 737 (Mo.App. E.D. 1993).

Jury instruction in action alleging that majority shareholder breached contractual obligation to register minority shares as expeditiously as possible so as to permit public sale improperly allowed jury to award damages for plaintiff minority shareholder's unexercised warrants and options, and error was prejudicial; range of evidence as to value of shares and date by when registration as "expeditiously as possible" could have been reasonably accomplished confounded post-hoc surmise of amount of award allocated as damages to shares. *Wulfing v. Kansas City S. Indus., Inc.*, 842 S.W.2d 133 (Mo.App. W.D. 1992).

In an action brought for breach of contract, the giving of MAI 4.01 rather than MAI 4.02 was error. *Steffens v. Paramount Props., Inc.*, 667 S.W.2d 725, 728 (Mo.App. E.D. 1984).

In actions for breach of special types of contracts, a not-in-MAI instruction correctly specifying the measure of damages is preferable to modifying an MAI. *Leh v. Dyer*, 643 S.W.2d 65 (Mo.App. E.D. 1982).

Breach of contract. Damage allowed is contract price less cost of completing contract. *Ark Constr. Co., Inc. v. City of Florissant*, 558 S.W.2d 418 (Mo.App. 1977).

Where liability is no longer an issue and the amount of damages is the only issue, MAI 4.01 must be amended accordingly. *Sears, Roebuck & Co. v. Peerless Prods., Inc.*, 539 S.W.2d 768 (Mo.App. 1976).

MAI 4.01 is proper in actions for breach of contract. *N. Cty. Sch. Dist. R-1 v. Fid. & Deposit Co.*, 539 S.W.2d 469 (Mo.App. 1976).

MAI's 4.01 and 4.05 are appropriate in a breach of contract action. *S.P. Pers. Assocs., Inc. v. Hosp. Bldg. & Equip. Co., Inc.*, 525 S.W.2d 345 (Mo.App. 1975).

9. Multiple plaintiffs

Where multiple plaintiffs had separate verdict-directors, each was entitled to a separate damage instruction. *Kennedy v. Tallent*, 492 S.W.2d 33 (Mo.App. 1973). (Now compare MAI 4.18).

10. Multiple defendants

Two defendant motorists were jointly and severally liable for plaintiff's injuries received in separate collisions. Separate MAI 4.01's each referred to "the occurrence" mentioned in evidence. In view of their joint liability, neither defendant was prejudiced by each instruction referring to "occurrence" in the singular. *Barlow v. Thornhill*, 537 S.W.2d 412 (Mo.banc 1976).

11. Multiple injuries

Where plaintiff was injured in collision with defendant, and due to that injury he was further injured in a second collision, MAI 4.01 was properly modified to allow damages for both injuries. *Ponciroli v. Wyrick*, 573 S.W.2d 731 (Mo.App. 1978).

12. Quantum meruit

Damage instruction, before adoption of MAI 4.04, was properly modified to cover value of work and labor. *Kaiser v. Lyon Metal Prods., Inc.*, 461 S.W.2d 893 (Mo.App. 1970).

13. Fraud

Giving MAI 4.01 in fraud case held proper, particularly when neither party offered a modification nor contended later that the verdict was either inadequate or excessive. *Crawford v. Smith*, 470 S.W.2d 529 (Mo.banc 1971).

Missouri permits the use of instructions based on MAI 4.01 where the peculiar circumstances of the fraud makes the benefit of the bargain rule an inadequate measure of damages. *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281, 285 (8th Cir. 1984).

14. Conversion

Court found prejudicial the damages instruction given in counterclaim for conversion by secured party because it allowed the jury to speculate on the debtor's damages for loss of profits. *S. Mo. Bank v. Fogle*, 738 S.W.2d 153 (Mo.App. S.D. 1987).

In action for conversion, value must be determined as of time of conversion, to be submitted by a not-in-MAI damage instruction. *Breece v. Jett*, 556 S.W.2d 696 (Mo.App. 1977).

15. Nuisance

The appropriate damages instruction in an action for damages for a temporary nuisance is MAI 4.01. *Scantlin v. City of Pevely*, 741 S.W.2d 48 (Mo.App. E.D. 1987).

MAI 4.01 is the approved submission for a temporary nuisance. *Fletcher v. City of Independence*, 708 S.W.2d 158 (Mo.App. W.D. 1986).

When plaintiff's damages are temporary rather than permanent it was error to submit on MAI 4.02. *Mondelli v. Saline Sewer Co.*, 628 S.W.2d 697 (Mo.App. E.D. 1982).

MAI 4.01 is proper for damages for temporary nuisance and MAI 9.02 is proper for damages for permanent nuisance. *Spain v. City of Cape Girardeau*, 484 S.W.2d 498 (Mo.App. 1972).

16. Waste

MAI 4.01 is not the proper measure of damages in an action for waste. *Lustig v. U.M.C. Indus., Inc.*, 637 S.W.2d 55, 58 (Mo.App. E.D. 1982).

17. Direct result

Damage instruction based on MAI 4.01, providing that injured customer's damages were only those that "directly resulted" from store owner's conduct, should have been modified to track verdict director based on MAI 19.01, providing that store owner was liable if its failure to use ordinary care "directly caused or directly contributed to cause" damage to customer; confusion engendered by conflict between these instructions prejudiced customer, entitling her to a new trial. *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo.banc 1998).

18. Missouri Merchandise Practices Act

Benefit of the bargain was not appropriate measure of damages in student's action against college for violation of Missouri Merchandise Practices Act, and thus, MAI 4.01 was the proper damages instruction, where student alleged that the education she received was worthless. *Kerr v. Vatterott Educ. Ctrs., Inc.*, 439 S.W.3d 802 (Mo.App. W.D. 2014).

4.02 [1980 Revision] Property Only

If you find in favor of plaintiff, then you must award plaintiff such sum as you may find from the evidence to be the difference between the fair market value[1] of the *(here identify property)* before it was damaged and its fair market value[1] after it was damaged, [plus such sum as you may find from the evidence will fairly and justly compensate plaintiff for the loss of use thereof during the time reasonably necessary for the property to be repaired or replaced.][2]

Notes on Use (2002 Revision)

1. The phrase "fair market value" must be defined. See MAI 16.02.

2. The bracketed portion of the above instruction should be used only where loss of use is pleaded and supported by the evidence.

This instruction should be used in cases involving property damage only.

In those cases in which the cost of repair is the appropriate measure of damages (as recited in the Committee Comment), the instruction should read:

> If you find in favor of plaintiff, then you must award the plaintiff such sum as you may find from the evidence to be the reasonable cost of repair of any damage to *(here identify property)*, [plus such sum as you may find from the evidence will fairly and justly compensate plaintiff for the loss of use thereof until such property could be reasonably repaired].

Where comparative fault is submitted in a case involving property damage only, this instruction should be modified in the format of MAI 37.03.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

Committee Comment (1969 New)

A. This instruction was added to meet the special case of property damage only when MAI 4.01 might not provide the precise guidelines available. Where *both* personal and property damages are involved MAI 4.01 must still be used.

B. In *Randall v. Steelman*, 294 S.W.2d 588, 594 (Mo.App. 1956) the court said: "The damage allowable for personal property is the difference between the reasonable market value before it was damaged and the reasonable market value after it was damaged."

C. In *Brunk v. Hamilton-Brown Shoe Co.*, 334 Mo. 517, 533, 66 S.W.2d 903, 910 (1933) the Supreme Court said: "As to personal property damage, however, there is a definite rule for calculation, to wit: The difference between the reasonable market value before and after injury; and the jury should be so informed."

D. In *Hayes v. Dalton*, 257 S.W.2d 198, 201 (Mo.App. 1953) the court said:

> Fundamentally the measure of damages for injury to an article of personal property such as an automobile is the difference in the reasonable market value of the automobile before and after the injury, which may be shown by proof of the reasonable and necessary cost of repairing and restoring the automobile to its condition prior to the injury. If the cost of repairs results in causing the automobile to be more valuable than it was before the injury, such excess must be deducted from the cost of repairs, while if the automobile, after the repairs are made upon it, is still not as valuable as it was before the injury, the owner may then recover, in addition to the cost of repairs, such amount as will equal the difference between the value of the automobile after the repairs are made upon it and immediately prior to the injury. *General Exchange Ins. Corporation v. Young, Mo.App.*, 206 S.W.2d 683; *Conner v. Moving & Storage Co., Mo.App.*, 218 S.W.2d 830; *Blanke v. United Rys. Co., Mo.App.*, 213 S.W. 174.

E. In some cases the cost of repair is the appropriate measure of damages. In *Gulf, M. & O. R. Co. v. Smith-Brennan Pile Co.*, 223 S.W.2d 100 (Mo.App. 1949), the plaintiff was suing for damage to one of its bridges. The court said, *id.* at 104–05:

> The general rule as heretofore stated, is that the measure of damage is the difference between the reasonable value of the property before and the reasonable value thereof after the accident. We are aware that in cases where the amount of damage is insignificant, as compared to the value of the property as a whole and involves only a small part thereof, there is an exception to the above general rule. However, before allowing plaintiff to rely solely on evidence of the costs of repair, there should be a showing of the comparative insignificance of the damage to bring the case within such exception to the general rule. . . .
>
> If an exception to the market value theory of the measure of damages were to be allowed in this kind of case because of the absence of a "market" value of a bridge, the exception should most certainly go no farther than to permit plaintiff to show what the actual reasonable costs of repair would be on

the open market if made by competent persons engaged in such business.

F. See also *Curtis v. Fruin-Colnon Contracting Co.*, 363 Mo. 676, 253 S.W.2d 158 (1952).

Research References

West's Key Number Digest
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1. In general

Damage to automobile is determined by before and after values except where cost of repair is comparably insignificant. *Groves v. State Farm Mut. Auto. Ins. Co.*, 540 S.W.2d 39 (Mo.banc 1976).

In suit to recover damages for permanent nuisance the correct measure of damages is based on before-and-after values and is improperly submitted by MAI 4.01. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970).

Property damage only instruction, rather than instruction relating to personal and property damage, was proper instruction for submitting question of damages in contract and warranty suit against elevator installation and service company for improper maintenance and repair of elevators in trustee's building, given highlighted titles of two instructions and notes on use for property damage only instruction. *Dubinsky v. U.S. Elevator Corp.*, 22 S.W.3d 747 (Mo.App. E.D. 2000).

Fire insurer was not prejudiced by jury instruction on damages telling jury to consider uses to which "property may be applied or for which it is best adapted, under existing conditions and under conditions to be reasonably expected in the near future," as evidence revealed nothing of significance with respect to other uses for insured's house and lot other than residential use. *Sharaga v. Auto Owners Mut. Ins. Co.*, 831 S.W.2d 248 (Mo.App. W.D. 1992).

In action for permanent nuisance the correct damages instruction is MAI 9.02, not MAI 4.02. *Scantlin v. City of Pevely*, 741 S.W.2d 48 (Mo.App. E.D. 1987).

While pattern instruction on property damages should have been modified to account for issue of multiple causation, reversal was not required where damages for which city could be held liable was explained to jury in other instructions. *Larabee v. City of Kansas City*, 697 S.W.2d 177 (Mo.App. W.D. 1985).

MAI 4.02 was not proper damage instruction where plaintiff sought to recover consequential damages caused by defendant's breach of warranty of workmanlike performance of vehicle maintenance, since MAI 4.02 would limit plaintiff's recovery to only the damage to his car. *Crank v. Firestone Tire & Rubber Co.*, 692 S.W.2d 397 (Mo.App. W.D. 1985).

Where case involved a total fire loss of both real and personal property, MAI 4.02 was not applicable since "fair market value" is not relevant to recovery for damages to a house and its contents, and the other damages claimed did not relate to fair market value. *Travelers Indem. Co. v. Woods*, 663 S.W.2d 392 (Mo.App. S.D. 1983).

MAI 4.02 is not applicable where the damages sought include items not measurable by before-and-after value or by cost of repair. Thus reasonable expenses proximately resulting from damage to property, although usually recoverable, do not fall within MAI 4.02, and were properly charged under MAI 4.01. *Stegan v. H.W. Freeman Constr. Co., Inc.*, 637 S.W.2d 794 (Mo.App. E.D. 1982).

When plaintiff's damages are temporary rather than permanent, it was error to submit on MAI 4.02. *Mondelli v. Saline Sewer Co.*, 628 S.W.2d 697 (Mo.App. E.D. 1982).

In bailment action, where property was returned but in damaged condition, proper damage instruction was MAI 4.02 based on before-and-after values, not MAI 4.01. *Emcasco Ins. Co. v. Auto Driveaway Co.*, 586 S.W.2d 780 (Mo.App. W.D. 1979).

A party may not complain of lack of evidence to support his own instruction. *Smith v. Norman*, 586 S.W.2d 84 (Mo.App. E.D. 1979).

Alternative damage instructions discussed in buyers' suit against seller for cost of repairing latent defects. *Matulunas v. Baker*, 569 S.W.2d 791 (Mo.App. 1978).

In action for damage to building MAI 4.02, not MAI 4.01 was the proper damage instruction. *DeArmon v. City of St. Louis*, 525 S.W.2d 795 (Mo.App. 1975).

MAI 4.02 permits plaintiff to recover for diminution in value existing after repair. *Winter v. Elder*, 492 S.W.2d 146 (Mo.App. 1973).

Where plaintiffs granted powerline easement for defendant's promise to pay stated amount for each pole installed it was error to give plaintiffs' not-in-MAI instructions authorizing recovery for difference between before-and-after values since plaintiffs' recovery was limited to breach of defendant's promise to pay agreed amount. *Shelton v. M & A Elec. Power Co-op.*, 451 S.W.2d 375 (Mo.App. 1970).

2. Modification

Where damage is the result of multiple causation, the damage instruction should require the jury by its findings to separate or apportion the damages directly resulting from the negligence of the defendant. *Moore v. Woolbright*, 670 S.W.2d 190 (Mo.App. S.D. 1984).

Where both verdict directors were based on damages *after* January 5, it was necessary to modify damage instruction MAI 4.02 to include evidence of *prior damage* since instructions are read together. *Goodwin v. S.J. Groves & Sons Co.*, 525 S.W.2d 577 (Mo.App. 1975).

Where plaintiff's damage was only to property it was prejudicial error to give MAI 4.01 instead of MAI 4.02. *State ex rel. State Highway Comm'n v. Beaty*, 505 S.W.2d 147 (Mo.App. 1974).

Where there was no open market for condemned school property, MAI 9.02 was properly modified by deleting the words "fair market." *Reorganized Sch. Dist. v. Mo. Pac. R.R. Co.*, 503 S.W.2d 153 (Mo.App. 1973).

Where statutory measure of damages was difference between contract price and value of goods in damaged condition, MAI 4.02 was properly modified to so state. *Nat'l Beef Packing Co. v. Mo. Pac. R.R. Co.*, 479 S.W.2d 155 (Mo.App. 1972).

3. Permanent damages

Where plaintiffs sought damages for flooding their property, MAI 4.02 was the proper damage instruction, and giving MAI 4.01 was error warranting the new trial granted. *Ogle v. Terminal R.R. Ass'n of St. Louis*, 534 S.W.2d 809 (Mo.App. 1976).

MAI 4.02 proper in action for permanent, major damage by negligently flooding land. *Kelso v. C.B.K. Agronomics, Inc.*, 510 S.W.2d 709 (Mo.App. 1974).

4. Definition

Giving a modified MAI 4.02 without definition of fair market value (MAI 16.02) was a roving commission and plain error. *Floyd v. Brenner*, 542 S.W.2d 325 (Mo.App. 1976).

5. Conversion

In action for conversion, value must be determined as of time of conversion, to be submitted by a not-in-MAI damage instruction. *Breece v. Jett*, 556 S.W.2d 696 (Mo.App. 1977).

6. Loss of use

MAI 4.02 and notes on use for that instruction do not require or provide for a definition of "loss of use;" therefore, the court did not err in failing to define it. *Kaiser v. Kadean Constr. Co.*, 719 S.W.2d 892, 895 (Mo.App. E.D. 1986).

In cause of action seeking damages, whereby plaintiff as seller of house had lent house key to defendant as purchaser of house before actual closing of the deal, and defendant used the key to radically alter the interior of the house in plaintiff's absence, compensation for loss of use may be a proper item and certainly the expenses attendant upon living elsewhere until the house could be restored to a condition that would be suitable for habitation would be an item of expense that could be included in damage.

Wright v. Edison, 619 S.W.2d 797, 801 (Mo.App. E.D. 1981).

7. Consequential damages

When plaintiff seeks consequential damages caused by defendant's breach of warranty, approved instruction used in cases involving property damage only, which measures damages as difference between fair market value before and after occurrence, plus compensation for loss of use, is inapplicable, in that it does not correctly state rule for recovery of consequential damages. *St. John's Bank & Trust Co. v. Intag, Inc.*, 938 S.W.2d 627 (Mo.App. E.D. 1997).

8. Trespass

As there is no approved MAI instruction of trespass to land and since MAI 4.02 is the required damage instruction in cases involving property damages only, a modified version of MAI 4.02 is the proper damage instruction for trespass actions. *Sterbenz v. Kansas City Power and Light Co.*, 333 S.W.3d 1 (Mo.App. W.D. 2010).

4.03 [1969 New] Property—Misrepresentation

If you find in favor of the plaintiff, then you must award plaintiff such sum as you believe was the difference between the actual value of the *(describe property, such as "the furnace")* on the date it was sold to plaintiff and what its value would have been on that date had the *(describe property)* been as represented by defendant.

Notes on Use (1981 Revision)

This damage instruction is to be used where plaintiff is suing for misrepresentation. Where plaintiff has evidence of other damages (such as personal injuries suffered because the property was not as represented), MAI 4.01 should be used.

Committee Comment (1969 New)

A. This additional damage instruction was prepared to meet a special situation in which MAI 4.01 might not give adequate guidance.

B. In *Reynolds v. Davis*, 303 Mo. 418, 432, 260 S.W. 994, 997 (1924), the Missouri Supreme Court said:

> In a case of this sort and under proper pleading, a defrauded plaintiff may be awarded such damages as will enable him to receive not only the difference between the actual market value of the property and the price which he paid therefor, but something over and above such damages, if any, represented by the difference between the price actually paid by him for such property and what its value would have been if it had been as represented. Such damages enable a defrauded party to obtain "the benefit of his bargain." Recovery of such damages is authorized in Missouri, as is clearly shown by the following cases, which we find in respondent's brief: Kendrick v. Ryus, 225 Mo. 150, loc. cit. 165, 123 S.W. 937, 135 Am. St. Rep. 585; Morrow v. Franklin, 289 Mo. 549, 233 S.W. 224, loc. cit. 232; Ryan v. Miller, 236 Mo. 496, loc. cit. 508, 139 S.W. 128; Ann. Cas. 1912D, 540; Addis v. Swofford (Mo. Sup.) 180 S.W. 548, loc. cit. 555; Bank v. Byers, 139 Mo. 627, 41 S.W. 325; Boyce v. Gingrich, 154 Mo.App. 198, loc. cit. 204, 134 S.W. 79; Boyd v. Wahl, 175 Mo.App. 181, 157 S.W. 833.

Research References

West's Key Number Digest
Damages ⚷210(1)

Annotations

1. In general

MAI 4.03 is ordinarily the correct measure of damages in a case of fraud. However, Missouri permits the use of other measures of damages where the peculiar circumstances of the fraud make the benefit-of-the-bargain rule an inadequate measure of damages. *Kerr v. First Commodity Corp. of Boston*, 735 F.2d 281, 285 (8th Cir. 1984).

Error, if any, by trial court in submitting instruction on actual damages in fraud action brought by purchasers against real estate sales company was not prejudicial and did not require reversal; company did not object to instruction, failure of instruction to identify "property" that was referenced did not present real possibility of prejudice, and actual damages awarded did not evidence realization of whatever possibility of prejudice existed. *Haberstick v. Gordon A. Gundaker Real Estate Co.*, 921 S.W.2d 104 (Mo.App. E.D. 1996).

In action for misrepresentation by buyer of boat against seller, trial court committed reversible error by instructing jury on personal and property measure of damages instead of misrepresentation measure of damages. *Strebler v. Rixman*, 616 S.W.2d 876 (Mo.App. E.D. 1981).

4.04 [1981 Revision] Quantum Meruit

If you find in favor of plaintiff, then you must award plaintiff the reasonable value of the goods furnished [with __% interest thereon from ________, ____].[1]

Notes on Use (1981 Revision)

1. If claiming interest, use bracketed phrase and insert appropriate interest rate and date.

Committee Comment (2012 Revision)

A. Section 408.020, RSMo, states:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

B. In *Weekley v. Wallace*, 314 S.W.2d 256, 257 (Mo.App. 1958) the court said:

> But a demand is essential to the right to recover interest on such accounts. [Citing cases.] The demand need be in no certain form, but must be definite as to amount and time. [Citing cases.] In the absence of such a demand for payment of an unwritten account, the filing of the suit substitutes for the previous demand, and starts the interest-bearing period, to be computed as of the date of the verdict.

C. See also *Koppe v. Campbell*, 318 S.W.3d 233, 244 (Mo.App. W.D. 2010) where the court stated:

> Nonetheless, Respondents assert that the trial court was correct in granting the motion for new trial because Koppe made no demand for payment of a specific amount, either prior to trial or in his petition. While Respondents are correct that Koppe made no specific demand, their conclusion that this failure precludes prejudgment interest in this case is erroneous. This is so because "[a]s to the requirement that a party make a demand for payment, even if a demand for payment was not made prior to filing a lawsuit, the filing itself constitutes a demand." *Hawk Isolutions Group, Inc. v. Morris*, 288 S.W.3d. 758, 762 (Mo.App. E.D. 2009).

D. If plaintiff elects to sue in quantum meruit even though plaintiff has an express contract, plaintiff may not recover a sum in excess of his contract price. *Cross v. Robinson*, 281 S.W.2d 22, 26 (Mo.App. 1955).

E. For recovery of attorney's fees under quantum meruit and a general discussion regarding the recovery of prejudgment interest see *Koppe*, 318 S.W.3d at 244.

Research References

West's Key Number Digest
Damages ⚷210(1)

Legal Encyclopedias
C.J.S., Brokers §§ 363, 364

Annotations

In general 1
Modification 2

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1. In general

Submission of a quantum meruit theory by a bilateral contract verdict directing instruction was error, and such error was compounded by the use of a bilateral contract verdict director in conjunction with a quantum meruit damages instruction. Instructions which intermingle inconsistent guides for recovery are prejudicially erroneous. *Hall v. Cooper*, 691 S.W.2d 507 (Mo.App. W.D. 1985).

In home builder's action for balance of price of house, MAI 4.04 was proper damage instruction with MAI 26.03. *Wehrend v. Roknick*, 664 S.W.2d 247 (Mo.App. E.D. 1983).

Error to give second damage instruction, modified MAI 4.01, in action on account in which MAI 4.04, the appropriate damage instruction, properly modified to include "material and labor" instead of "goods," was given, but such error was not prejudicial where jury awarded amount alleged as due on account. *Kunkle Water and Elec., Inc. v. Nehai Tonkayea Lake Ass'n, Inc.*, 639 S.W.2d 177 (Mo.App. W.D. 1982).

Plaintiff contracted and was paid for specific work at stated price, but sued for "extras" done on estimated basis. Plaintiff properly submitted on quantum meruit; not error to submit without reference to contract price. *Bodde v. Burnham*, 588 S.W.2d 516 (Mo.App. W.D. 1979).

Modified MAI 26.05 to submit plaintiff's claim for services rendered beyond agreed salary, and modified damages instruction for same. *Austin v. Kansas City Gen. Hosp. & Med. Ctr.*, 570 S.W.2d 752 (Mo.App. 1978).

Where plaintiff submitted on MAI 26.03—Action on Account, its proper damage instruction was MAI 4.04. *Hereford Concrete Prods. v. Aerobic Servs.*, 565 S.W.2d 176 (Mo.App. 1978).

Damage instruction, before adoption of MAI 4.04, was properly modified to cover value of work and labor. *Kaiser v. Lyon Metal Prods., Inc.*, 461 S.W.2d 893 (Mo.App. 1970).

Prior to MAI 4.04 on damages in quantum meruit, in action for services rendered it was not error to give a not-in-MAI damage instruction allowing a sum that would "fairly, reasonably and justly compensate plaintiff". *McAtee v. Greenspon*, 439 S.W.2d 187 (Mo.App. 1969).

2. Modification

While the court did not approve of the adding of additional language to MAI 4.04, no actual prejudice resulted from inclusion in the instruction of additional language referring to factors jury could consider in determining the reasonable value of attorney's legal services. *Koppe v. Campbell*, 318 S.W.3d 233 (Mo.App. W.D. 2010).

Jury instructions were not erroneous, despite being taken from two separate approved instructions, where suit asserted claims of both quantum meruit and breach of warranty, core language from each approved instruction was given, and instructions stated that if jury found for plaintiff, amount awarded would be lower of the two theories. *Executone of*

St. Louis, Inc. v. Normandy Osteopathic Hosp., 735 S.W.2d 772 (Mo.App. E.D. 1987).

4.05 [1996 Revision] Broker's Commission—Agreed Percentage

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe plaintiff and defendant agreed upon as a commission [with __% interest thereon from ________, ____].[1]

Notes on Use (1996 New)

1. If claiming interest, use bracketed phrase and insert appropriate interest rate and date.

Research References

West's Key Number Digest
Brokers ⚷88(13)

Legal Encyclopedias
C.J.S., Brokers §§ 363, 364, 367

Annotations

1. In general

In action by investment banking firm for breach of contract for it to provide underwriting services, there was no prejudice in instruction that damages were to be in such sum as jury believed that parties agreed upon as a commission where the discrepancy between amount of agreed underwriter's discount and the substantially lower amount awarded made it evident that jury took into consideration the costs firm did not incur because it did not have to buy and resell bonds. *Smith Moore & Co. v. J.L. Mason Realty & Inv., Inc.*, 817 S.W.2d 530 (Mo.App. E.D. 1991).

Error to modify MAI 4.05 to direct allowance of specific amount where the amount was in dispute. *Shurtz v. Jost*, 597 S.W.2d 652 (Mo.App. E.D. 1979).

MAI's 4.01 and 4.05 are appropriate in a breach of contract action. *S.P. Pers. Assocs., Inc. v. Hosp. Bldg. & Equip. Co., Inc.*, 525 S.W.2d 345 (Mo.App. 1975).

4.06 [1996 Revision] Broker's Commission—No Amount Agreed

If you find in favor of plaintiff, you must award plaintiff such sum as you believe is a fair and just commission [with __% interest thereon from ________, ____].[1]

Notes on Use (1996 New)

1. If claiming interest, use bracketed phrase and insert appropriate interest rate and date.

Research References

West's Key Number Digest
Brokers ⚷88(13)

Annotations

1. In general

Prior to MAI 4.04 on damages in quantum meruit, in action for services rendered it was not error to give a not-in-MAI damage instruction allowing a sum that would "fairly, reasonably and justly compensate plaintiff". *McAtee v. Greenspon*, 439 S.W.2d 187 (Mo.App. 1969).

4.07 [1996 Revision] Action to Recover for Services Furnished Decedent

If you find in favor of plaintiff, then you must award plaintiff the reasonable value of the services furnished [with __% interest thereon from ________, ____].[1]

Notes on Use (1996 New)

1. If claiming interest, use bracketed phrase and insert appropriate interest rate and date.

Committee Comment (1980 Revision)

A. Section 408.020, RSMo states:

> Creditors shall be allowed to receive interest at the rate of nine percent per annum, when no other rate is agreed upon, for all moneys after they become due and payable, on written contracts, and on accounts after they become due and demand of payment is made; for money recovered for the use of another, and retained without the owner's knowledge of the receipt, and for all other money due or to become due for the forbearance of payment whereof an express promise to pay interest has been made.

B. In *Weekley v. Wallace*, 314 S.W.2d 256, 257 (Mo.App. 1958) the court said:

> But a demand is essential to the right to recover interest on such accounts. [Citing cases.] The demand need be in no certain form, but must be definite as to amount and time. [Citing cases.] In the absence of such a demand for payment of an unwritten account, the filing of the suit substitutes for the previous demand, and starts the interest-bearing period, to be computed as of the date of the verdict.

Research References

West's Key Number Digest
Executors and Administrators ⚷451(3)

Legal Encyclopedias
C.J.S., Trial § 850

4.08 [1980 New] Contract—When Substantial Performance Submitted

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe is the balance due plaintiff under the contract less any sum necessary to correct any variations.

Notes on Use (1980 New)

This instruction is to be used only in cases involving contracts in which substantial performance is sufficient. See the verdict directing instruction MAI 26.07.

Research References

West's Key Number Digest
Damages ⚷218

4.09 [1980 Revision] Amount Not in Dispute

If you find in favor of plaintiff, then you must award plaintiff $ ________. *(insert amount)*

Notes on Use (1980 Revision)

This instruction is to be used where there is no dispute as to the amount of damages.

Research References

West's Key Number Digest
Damages ⚷210(1)

Annotations

1. In general

Use of approved damage instruction designed for cases where damages were undisputed would have been inappropriate, where liquidated damage sum provided for under contract was but one of the damage elements sought and proper amount of attorney fees was disputed. *Metro Waste Sys., Inc. v. A.L.D. Servs., Inc.*, 924 S.W.2d 335 (Mo.App. E.D. 1996).

Use of MAI 4.09 is mandatory when the only element of damage sought is a liquidated damage amount (use of MAI 4.09 would have been inappropriate in instant case because dispute over proper amount of attorney fees called for a factual evaluation; MAI 4.01 would have been correct damage instruction in this breach of contract action). *Metro Waste Sys., Inc. v. A.L.D. Servs., Inc.*, 924 S.W.2d 335 (Mo.App. E.D. 1996).

In case involving breach of home improvement contract containing a liquidated damages clause, MAI 4.09 was properly submitted instead of MAI 4.01. *Standard Improvement Co. v. DiGiovanni*, 768 S.W.2d 190, 192 (Mo.App. W.D. 1989).

Court's instruction that did not allow jury to assess lesser amount of damages on third-party claim than consent judgment against third-party plaintiff was proper where there was no issue of amount of consent judgment or contention that amount of such judgment was excessive. *O'Neil Lumber Co. v. Allied Builders Corp.*, 663 S.W.2d 326 (Mo.App. E.D. 1983).

4.10 [2012 Withdrawn] Ejectment

Historical Note

(MAI 4.10 (1980 Revision) and its related Notes on Use and Committee Comment have been withdrawn. All instructions relating to Ejectment have been collected in Chapter 27 of MAI-Civil. MAI 4.10 has been replaced by MAI 27.05 (2012 Revision)).

4.11 [2012 Withdrawn] Uninsured Motor Vehicle—Suit Against Insurer Only

Historical Note

(MAI 4.11 (1980 Revision) and its related Notes on Use have been withdrawn. All instructions relating to Uninsured Motor Vehicles have been collected in Chapter 12 of MAI-Civil. MAI 4.11 has been replaced by MAI 12.06 (2012 Revision)).

4.12 [1979 New] Apportionment of Fault—Plaintiff Claiming Against All From Whom Apportionment Is Sought—Plaintiff's Claim and Apportionment Decided in Same Trial

If Verdict ________ [1] is in favor of plaintiff and against *(here use descriptive phrase designation, i.e., both defendants; more than one defendant; etc.)*, you must assess the proportion of the fault which each party listed in Verdict ________ [2] has for plaintiff's damage [assessed in Verdict ________[1]].[3]

Notes on Use (1979 New)

1. Insert the letter designation of the form of verdict deciding plaintiff's claim for damages.

2. Insert the letter designation of the form of verdict assessing the proportions of fault (MAI 36.15).

3. Use when necessary to limit the apportionment to damages assessed in Verdict ________ [1].

The MAI Committee recommends this instruction for use where plaintiff's claim and the apportionment of fault issues are tried in the same trial. It can be used either where all issues are submitted simultaneously or in a "split-submission," i.e., a "bifurcated trial" procedure.

Add the following paragraph when a master's liability is submitted only on vicarious liability for the servant's conduct and both master and servant are defendants:

> If Verdict ________ is against both *(insert names of master and servant)* because of the conduct of *(insert name of servant)* only, then in deciding proportions of fault you must consider them both as one party and assess only the fault of *(insert name of servant)* as the fault of both *(insert names of master and servant).*

In preparing the verdict form for apportionment in such a case wherein the master's liability is submitted only on his servant's conduct, insert the names of both master and servant on the same line in accordance with the direction to the jury to assess only the fault of the servant as the fault of both.

Committee Comment (1996 Revision)

A. *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*, 566

S.W.2d 466 (Mo.banc 1978), authorizes a defendant to request apportionment of the relative fault for plaintiff's damage. The case recognizes the right of the plaintiff either to file a claim against a third-party defendant or to refuse to do so. It also recognizes that the apportionment issue may be severed for a separate trial. This instruction is intended for use in a case where plaintiff claims and submits against all parties against whom apportionment of fault is sought and in which the apportionment issues are submitted in the same trial with plaintiff's claims.

B. If apportionment of fault is sought against one or more parties against whom plaintiff asserts no claim, use MAI 4.13; if the apportionment issues are not submitted in the same trial with plaintiff's claims, MAI 4.14 should be used.

C. This instruction, Notes on Use, and Committee Comment were originally promulgated as recommended by the Committee, but were neither approved nor disapproved by the Supreme Court. The Supreme Court, with the publication of the Fifth Edition of MAI, approved the approach to "apportionment of fault" contemplated by MAI 4.12, 4.13, 4.14, and verdict forms 36.15 and 36.16.

Research References

West's Key Number Digest
Negligence ⊶1746

Annotations

1. Pleadings

A third-party plaintiff seeking contribution from an alleged joint tortfeasor is not required to admit its fault to the plaintiff in its third-party petition. *Travelers Prop. Cas. Co. of Am. v. Manitowoc Co., Inc.*, 389 S.W.3d 174 (Mo.banc 2013).

4.13 [1979 New] Apportionment of Fault—Plaintiff Not Claiming Against All From Whom Apportionment of Fault Is Sought—Plaintiff's Claim and Apportionment Decided in Same Trial

If Verdict ________[1] is in favor of plaintiff and against *(insert name of party or parties seeking apportionment)*[2] and if Verdict ________[3] is in favor of *(insert name of party or parties seeking apportionment)*,[2] you must assess the proportion of the fault which each party listed in Verdict ________[4] has for plaintiff's damage [assessed in Verdict ________[1]].[5]

Notes on Use (1979 New)

1. Insert the letter designation of the form of verdict deciding plaintiff's claim for damages.

2. If more than one party is seeking apportionment insert [either or both] [one or more of] before the name of the parties seeking apportionment.

3. Insert the letter of the form of verdict requiring apportionment of fault (MAI 36.16).

4. Insert the letter designation of the form of verdict assessing the proportions of fault (MAI 36.15).

5. Use when necessary to limit the apportionment to damages assessed in Verdict ________.[1]

The MAI Committee recommends this instruction for use where plaintiff's claim and the apportionment of fault issues are tried in the same trial. It can be used either where all issues are submitted simultaneously or in a "split-submission," i.e., a "bifurcated trial" procedure.

Add the following paragraph when a master's liability is submitted only on vicarious liability for the servant's conduct and both master and servant are defendants:

> If Verdict ________ is against both *(insert names of master and servant)* because of the conduct of *(insert name of servant)* only, then in deciding proportions of fault you must consider them both as one party and assess only the fault of *(insert name of servant)* as the fault of both *(insert names of master and servant)*.

In preparing the verdict form for apportionment in such a case wherein the master's liability is submitted only on his servant's conduct, insert the names of both master and servant on the same line in accordance with the direction to the jury to assess only the fault of the servant as the fault of both.

Committee Comment (1996 Revision)

A. *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo.banc 1978), authorizes a judgment apportioning fault of a third-party defendant against whom the plaintiff does not claim or submit. This instruction is intended for use in such a case wherein the apportionment issues are submitted in the same trial with plaintiff's claim.

B. Since the plaintiff will not submit the issue of the third party defendant's liability (fault) for plaintiff's damage, the party seeking apportionment will need to submit the issue of third party's fault for plaintiff's damage by an appropriate verdict directing instruction.

C. This instruction, Notes on Use, and Committee Comment were originally promulgated as recommended by the Committee, but were neither approved nor disapproved by the Supreme Court. The Supreme Court, with the publication of the Fifth Edition of MAI, approved the approach to "apportionment of fault" contemplated by MAI 4.12, 4.13, 4.14, and verdict forms 36.15 and 36.16.

Research References

West's Key Number Digest
Negligence 🔑1746

Annotations

1. Pleadings

A third-party plaintiff seeking contribution from an alleged joint tortfeasor is not required to admit its fault to the plaintiff in its third-party petition. *Travelers Prop. Cas. Co. of Am. v. Manitowoc Co., Inc.*, 389 S.W.3d 174 (Mo.banc 2013).

4.14 [1979 New] Apportionment of Fault—Separate Trial

If your verdict is in favor of *(insert name of party or parties seeking apportionment)*[1] and against *(here use descriptive phrase designation, i.e., the defendant, one or more of the defendants, both defendant Doe and third-party defendant Roe, defendant Doe and one or more of the third-party defendants, etc.)* on the claim[s] for apportionment of fault for the *(state the amount)* damages awarded *(state name of successful claimant)* in the other trial mentioned in evidence, you must assess the proportion of the fault which each party listed in Verdict ________[2] has for such damage.

Notes on Use (1979 New)

1. If more than one party is seeking apportionment insert [either or both] [one or more of] before the name of the parties seeking apportionment.

2. Insert the letter designation of the form of verdict apportioning fault.

Add the following paragraph when a master and servant are parties and the master's liability is submitted only on vicarious liability for the servant's conduct:

> In deciding proportions of fault you must consider both *(insert names of master and servant)* as one party and assess only the fault of *(insert name of servant)* as the fault of both *(insert names of master and servant).*

In preparing the verdict form for apportionment in such a case wherein the master's liability is based only on his servant's conduct, insert the names of both master and servant on the same line in accordance with the direction to the jury to assess only the fault of the servant as the fault of both.

Committee Comment (1996 Revision)

A. A claim for indemnity does not arise, technically, until the claimant's own liability to the original plaintiff is fixed. Civil Rule 55.06(b) specifically permits such a claim to be joined in the action which seeks to establish the liability of the claimant for which claimant seeks indemnity. *Missouri Pacific Railroad Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo.banc 1978) and Rule 66.02, recognize that simultaneous trial of both claims may be had or that the claims may be tried in separate trials.

B. This instruction is intended for use in an apportionment of damage case tried after trial of the claimant's damage suit. Thus, the claimant for apportionment may carry the party designation of defendant or plaintiff or third-party plaintiff, etc. The damage which is the basis for apportionment of fault will have been previously adjudicated. The instructions will need to submit the issue of the claimed fault of the party or parties against whom apportionment is sought.

C. This instruction, Notes on Use, and Committee Comment were originally promulgated as recommended by the Committee, but were neither approved nor disapproved by the Supreme Court. The Supreme Court, with the publication of the Fifth Edition of MAI, approved the approach to "apportionment of fault" contemplated by MAI 4.12, 4.13, 4.14, and verdict forms 36.15 and 36.16.

Research References

West's Key Number Digest
Negligence ⚷1746

Annotations

1. Pleadings

A third-party plaintiff seeking contribution from an alleged joint tortfeasor is not required to admit its fault to the plaintiff in its third-party petition. *Travelers Prop. Cas. Co. of Am. v. Manitowoc Co., Inc.*, 389 S.W.3d 174 (Mo.banc 2013).

4.15 [1980 New] Libel or Slander—Plaintiff Not a Public Official or Public Figure

If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][1] as a direct result of the *(describe the publication such as "publishing of the newspaper article," "making of the statement," etc.)* mentioned in the evidence.

[If you find the issues in favor of plaintiff, and if you believe that defendant *(describe the act of publication such as "published the newspaper article," "wrote the letter," "made the statement," etc.)* with knowledge that it was false or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true, then in addition to any damages to which you find plaintiff entitled under the foregoing paragraph, you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.][2]

Notes on Use (1980 New)

1. This may be added if supported by the evidence.

2. Use the bracketed second paragraph if plaintiff's evidence supports the submission of punitive damages under the requirements of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), which requires that for punitive damages, actual malice must be shown under the test set forth in *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964).

This damage instruction is for use in a case where MAI 23.06(1) or 23.10(1) is used as the verdict director. Use MAI 3.06 as the burden of proof instruction if punitive damages are submitted. If punitive damages are not sought, use MAI 3.01.

Committee Comment (1980 New)

A. See *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), for a discussion of the type of damage instruction required to meet the actual damage test of *Gertz v. Robert Welch, Inc., supra.*

Research References

West's Key Number Digest
Libel and Slander ⚷124(8)

Annotations

1. In general

Plaintiff need only to plead and prove unified defamation elements set out in applicable model jury instructions to establish defamation. *Boyd v. Schwan's Sales Enters., Inc.*, 23 S.W.3d 261 (Mo.App. S.D. 2000).

No prejudicial error resulted from instruction on actual damages that failed to also include instruction on punitive damages, as required by Notes on Use, where punitive damages were struck by trial court pursuant to defendant's motion for new trial. *Joseph v. Elam*, 709 S.W.2d 517 (Mo.App. E.D. 1986).

4.16 [1980 New] Libel or Slander—Plaintiff a Public Official or Public Figure

If you find the issues in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][1] as a direct result of the *(describe the publication such as "publishing of the newspaper article," "making of the statement," etc.)* mentioned in the evidence.

In addition to any damages to which you find plaintiff entitled under the foregoing paragraph, you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

Notes on Use (1996 Revision)

1. This may be added if supported by the evidence.

This damage instruction is for use in a case where MAI 23.06(2) or 23.10(2) is used as the verdict director. Use MAI 3.05 as the burden of proof instruction.

Research References

West's Key Number Digest
Libel and Slander ⚷124(8)

Annotations

1. In general

Plaintiff need only to plead and prove unified defamation elements set out in applicable model jury instructions to establish defamation. *Boyd v. Schwan's Sales Enters., Inc.*, 23 S.W.3d 261 (Mo.App. S.D. 2000).

4.17 [1980 New] Breach of Warranty Under Uniform Commercial Code—Accepted Goods

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe was the difference between the fair market value[1] of *(describe the article or product)* when plaintiff discovered or should have discovered [it did not conform][2] [it was unfit][3] and its fair market value [1] had it been as represented by defendant [plus such sum as you believe will fairly and justly compensate plaintiff for any other damage plaintiff sustained as a direct result of *(describe the article or product)* [failing to conform][2] [being unfit].[3]][4]

Notes on Use (1996 Revision)

1. The phrase "fair market value" must be defined. Use the first paragraph of MAI 16.02.

2. Use these bracketed phrases for an express warranty.

3. Use these bracketed phrases for an implied warranty.

4. Use the bracketed phrase where the evidence supports the submission of incidental and consequential damages described § 400.2-715, RSMo.

This instruction is applicable in situations which involve a breach of warranty under §§ 400.2-313 and 400.2-314, RSMo, and the goods have been accepted. The measure of damages is set forth in § 400.2-714, RSMo.

Where the goods have been rejected or acceptance has been revoked, see §§ 400.2-711 through 400.2-713.

Committee Comment (1980 New)

A. See MAI 4.01 Committee Comment for procedure to be followed in closing argument in the use of a short, simple damage instruction.

Research References

West's Key Number Digest
Products Liability ⚷420

Legal Encyclopedias
C.J.S., Products Liability § 282; Sales § 517

Annotations

1. In general

Testimony by expert of 20% reduction in automobile's value due to its unknown mileage, along with evidence of numerous repairs, was sufficient to establish automobile's fair market value when purchasers discovered problems with automobile, for purposes of purchasers' damages for breach of warranty against automobile manufacturer; damage instruction for breach of warranty was not required to elaborate on what aspect of product did not conform. *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346 (Mo.App. E.D. 1993).

MAI 4.17 does not require that a damage instruction for breach of warranty elaborate on what aspect of the product did not conform. *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346 (Mo.App. E.D. 1993).

4.18 [1991 New] Personal Injury and Loss of Consortium, Loss of Services or Medical Expenses—Spouse or Child Injured—Non-Comparative Fault Only

If you find in favor of plaintiff *(name of plaintiff with the primary claim)*, then you must award plaintiff *(name of plaintiff with primary claim)* such sum as you believe will fairly and justly compensate plaintiff *(name of plaintiff with primary claim)* for any damages you believe [he] [she][1] sustained [and is reasonably certain to sustain in the future][2] as a direct result of the occurrence[3] mentioned in the evidence.

If you further find that plaintiff *(name of plaintiff with derivative claim)* did sustain damage as a direct result of injury to [his] [her] [husband] [wife] [child],[1] you must award plaintiff *(name of plaintiff with derivative claim)* such sum as you believe will fairly and justly compensate plaintiff *(name of plaintiff with derivative claim)* for any damages due to injury to [his] [her] [husband] [wife] [child][1] which you believe [he] [she][1] sustained [and is reasonably certain to sustain in the future][2] as a direct result of the occurrence[3] mentioned in the evidence.

Notes on Use (2002 Revision)

1. Select appropriate word(s).

2. This may be added if supported by the evidence.

3. When the evidence discloses a compensable event and a noncompensable event, both of which are claimed to have caused damage, the term "occurrence" may need to be modified. See *Vest v. City Nat'l Bank and Trust Co.*, 470 S.W.2d 518 (Mo. 1971). When the term "occurrence" is modified, substitute some descriptive phrase that specifically describes the compensable event or conduct. As an example, if the plaintiff claims plaintiff sustained damages as a direct result of negligent medical care while being treated for a non-compensable fall or illness, the instruction may be modified to read, ". . . as a direct result of the conduct of defendant as submitted in Instruction Number ________ *(here insert number of verdict directing instruction)*." As another example, if plaintiff sustained damages in an automobile collision but also had a non-compensable illness, the instruction may be modified to read ". . . as a direct result of the automobile collision."

In a case such as *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo.banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the occurrence mentioned in the evidence" from this instruction and substitute the phrase "that *(describe the compensable event or conduct)* directly caused or directly contributed to cause."

Other modifications also may be appropriate.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01. In a case involving combined primary and derivative claims, the law of Missouri has not yet developed to indicate whether mitigation of damages instructions may be given on both claims or only on the primary injury claim. The Committee takes no position on this issue.

Committee Comment (1991 New)

A. This is a damage instruction for both the primary and the derivative claim in a non-comparative fault personal injury case with a derivative loss of consortium, loss of services or medical expense claim. See MAI 31.04 for the appropriate verdict directing instruction for the derivative claim and MAI 36.23 for the appropriate verdict form. See also Illustration 35.17.

B. This instruction should not be used in a comparative fault case. See MAI 37.08 for the damage instruction in a comparative fault case submitting both a primary claim and a derivative claim. See also Illustration 35.16.

Research References

West's Key Number Digest
Damages ⚷216(1)

Legal Encyclopedias
C.J.S., Damages §§ 434, 436, 437

Annotations

1. In general

The Missouri Supreme Court refused to recognize a cause of action for loss of parental consortium (consortium action by child due to injury to parent) or filial consortium (consortium action by sibling due to injury to another sibling). *Powell v. Am. Motors Corp.*, 834 S.W.2d 184 (Mo.banc 1992).

Spouse is not entitled to judgment on claim for loss of consortium merely because injured spouse was found entitled to recover. Consortium claimant is not entitled to nominal damages. *Lear v. Norfolk & W. Ry. Co.*, 815 S.W.2d 12 (Mo.App. W.D. 1991).

5.00

DAMAGES—WRONGFUL DEATH

5.01 Wrongful Death
5.02 Death of Husband—Alternate Form [Withdrawn 1981]
5.03 Death of Minor Child [Withdrawn 1981]
5.04 Death of Wife—Short Form [Withdrawn 1981]
5.05 Death of Wife—Alternate Form [Withdrawn 1981]
5.06 Administrator's Action on Behalf of Heirs—Short Form [Withdrawn 1981]
5.07 Administrator's Action on Behalf of Heirs—Alternate Form [Withdrawn 1981]
5.08 Death of Parent—Short Form [Withdrawn 1981]
5.09 Death of Parent—Alternate Form [Withdrawn 1981]

Research References

West's Key Number Digest
Damages 🔑216(1)

A.L.R. Library
West's A.L.R. Digest, Damages 🔑216(1)

Legal Encyclopedias
Am. Jur. 2d, Death § 368

5.01 [1996 Revision] Wrongful Death

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff[1] for any damages you believe plaintiff[2] [and decedent][3] sustained [and plaintiff[4] is reasonably certain to sustain in the future][5] as a direct result of the fatal injury to *(insert name of decedent).*

You must not consider grief or bereavement suffered by reason of the death.

Notes on Use (1996 Revision)

1. In the case where not all beneficiaries are joined as plaintiffs in the claim for wrongful death or the plaintiff is a plaintiff ad litem, substitute for the word "plaintiff[s]" the phrase "the survivor[s] of *(insert name of decedent).*"

2. Make an appropriate substitution if Note 1 is applicable, i.e., "they," "he," "she."

3. Use bracketed phrase where the evidence supports the submission of damages to decedent between the time of injury and time of death, i.e. pain and suffering.

4. If Note 1 is applicable, substitute for the phrase "plaintiff is" the phrase "the survivor[s] of *(insert name of decedent)* [is] [are]."

5. This may be added if supported by the evidence.

Where aggravating or mitigating circumstances are submitted in a wrongful death case, see Chapter 6.00.

Committee Comment (2021 Revision)

A. Section 537.090, RSMo, lists elements of compensable damage that were a part of the damage law before its enactment as well as permitting recovery for decedent's damages between injury and death. The separate elements of damage are properly a matter for argument and are not and should not be listed in this damage instruction.

B. During the instruction conference, the parties and the court should discuss (on the record) just what damages are supported by the evidence and properly can be argued to the jury. In this way, jury arguments can proceed without undue interruptions.

C. In *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo.banc 1995), the court held that aggravating circumstance damages of § 537.090, RSMo, are the equivalent of punitive damages and may be awarded only if accompanied by due process safeguards articulated in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991). See also *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003). See Chapter 6.00 for the submission of aggravating and mitigating circumstances.

D. The Committee is unable to determine under existing Missouri law whether the doctrine of mitigation of damages/avoidable consequences (see MAI 32.29 and MAI 4.01) is applicable to wrongful death cases in addition to the statutory "mitigating circumstances attending the death" under § 537.090, RSMo (see MAI 6.01). Thus, the Committee takes no position on such issue.

E. Pecuniary loss has not been hypothesized as an element of plaintiff's case because "where it appears in a statutory action for death that the death was caused by defendant's negligence, nominal damages may be recovered, although no actual pecuniary damage has been shown." *Stroud v. Masek*, 262 S.W.2d 47, 51 (Mo. 1953). "Judgment for nominal damages is a substantial right since such a judgment decides the incident of costs." *Id.*

See §§ 537.080 to 537.095, RSMo.

F. Section 537.090, RSMo. (2005) establishes rebuttable presumptions for the calculation of figures for the economic damages arising from the death of (1) a person not employed full time due to serving as a caregiver to minors or disabled persons; and (2) a person who was a minor at the time of death.

In the context of the rebuttable presumption for the calculation of pecuniary losses suffered by reason of the death of a minor child, the statute bases the loss on the "annual income of the deceased's parents . . ." It has been held that this presumption is an appropriate subject for expert testimony. See, *Mansil v. Midwest Emergency Med. Servs., P.C.*, 554 S.W.3d 471 (Mo.App. W.D. 2018). The Committee believes that these presumptions are a matter of evidence and should not be incorporated into a jury instruction.

Research References

West's Key Number Digest
Damages ⚷216(1)

Annotations

In general 1
Aggravating circumstances 2

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1. In general

Parents of minor child are no longer limited to pecuniary loss *during child's minority*. But, defendant is entitled to bracketed clause excluding parents' grief. *Mitchell v. Buchheit*, 559 S.W.2d 528 (Mo.banc 1977).

In parents' action for wrongful death of minor child, plaintiffs properly submitted their measure of damages by "the broad pecuniary loss standard" of MAI 5.03, and the court properly refused defendant's modified MAI 5.03 telling the jury the value of the child's services should be reduced by the parents' prospective cost of supporting her. MAI 5.03 is both a correct and a complete statement of the law. *Mudd v. Quinn*, 462 S.W.2d 757 (Mo. 1971).

In wrongful death suit, instruction that jury should award a sum to compensate "survivors of" decedent, rather than to "plaintiff," who was decedent's mother, was proper. *O'Neal v. Pipes Enters., Inc.*, 930 S.W.2d 416 (Mo.App. W.D. 1995).

MAI 5.01 is designed for use in a one-stage trial and is not appropriate for use in a two-stage trial; any error in instructions and verdict forms in wrongful death action against pharmacy that supplied improperly compounded cardioplegic solution for use during patient's open-heart surgery was invited by pharmacy by its motion to use bifurcated trial procedure which created unnecessary instruction problems and prevented use of proper damage instruction. *Schroeder v. Lester E. Cox Med. Ctr., Inc.*, 833 S.W.2d 411 (Mo.App. S.D. 1992).

2. Aggravating circumstances

Jury instruction on "aggravating circumstance" damages in wrongful death action was inadequate to guide jury's award of such punitive damages; while court correctly refused to give approved aggravating circumstance instruction due to its failure to give adequate guidance, and required aggravating circumstance damages to be set out separately from actual damages, modified approved instruction actually given lacked language informing jury to award "such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct," and standard for awarding such damages remained unconstitutionally vague. *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo.banc 1995).

In wrongful death action against asbestos manufacturers, manufacturers were not precluded from requesting instruction on mitigation of damages simply because plaintiffs exercised their option of not requesting instruction on aggravating circumstances. *Hagen v. Celotex Corp.*, 816 S.W.2d 667 (Mo.banc 1991).

Driving heavy truck down exit ramp with brakes constructively known to be inadequate warranted aggravating circumstances clause in wrongful death damage instruction. *Mudd v. Quinn*, 462 S.W.2d 757 (Mo. 1971).

Evidence that busy crossing was without effective warning warranted submission of aggravating circumstances clause. *Grothe v. St. Louis-S.F. Ry. Co.*, 460 S.W.2d 711 (Mo. 1970).

Aggravating circumstances may be submitted in uninsured motorist case; trial court in wrongful death case abused its discretion when it refused to include issue of aggravating circumstances in damage instruction; policy exclusions for punitive and exemplary damages do not preclude coverage for aggravating circumstances. *Moreland v. Columbia Mut. Ins. Co.*, 842 S.W.2d 215 (Mo.App. S.D. 1992).

Aggravating circumstances in a wrongful death action may be submitted where the defendant knew or had reason to know that there was a high degree of probability that the negligent action would result in injury. No definition of "aggravating circumstances," MAI 5.01, should be given. *Elliot v. Kesler*, 799 S.W.2d 97 (Mo.App. W.D. 1990).

Damages instruction MAI 5.01, modified in accordance with MAI 37.03 to submit comparative fault, that permitted the jury to consider aggravating circumstances in assessing damages in wrongful death action is proper when the defendant could have reasonably been charged with knowledge of potentially dangerous situation but failed to act to prevent or reduce danger. *Blum v. Airport Terminal Servs. Inc.*, 762 S.W.2d 67, 72–73 (Mo.App. E.D. 1988).

In order for the issue of aggravating circumstances to be submitted to the jury, there must be a showing of "willful misconduct, wantonness, recklessness, or a want of care indicative of indifference to consequences." *Weast v. Festus Flying Serv., Inc.*, 680 S.W.2d 262 (Mo.App. E.D. 1984).

Aggravating circumstances where brakeman saw pedestrian approaching close to crossing but took no action to apply emergency brake. *Wiseman v. Mo. Pac. R.R. Co.*, 575 S.W.2d 742 (Mo.App. 1978).

Evidence that defendant overtook another car while approaching a crest that hid approaching cars warranted the paragraph on aggravating circumstances. *Dougherty v. Smith*, 480 S.W.2d 519 (Mo.App. 1972).

5.02 [1981 Withdrawn] Death of Husband—Alternate Form

5.03 [1981 Withdrawn] Death of Minor Child

5.04 [1981 Withdrawn] Death of Wife—Short Form

5.05 [1981 Withdrawn] Death of Wife—Alternate Form

5.06 [1981 Withdrawn] Administrator's Action on Behalf of Heirs—Short Form

5.07 [1981 Withdrawn] Administrator's Action on Behalf of Heirs—Alternate Form

5.08 [1981 Withdrawn] Death of Parent—Short Form

5.09 [1981 Withdrawn] Death of Parent—Alternate Form

6.00

DAMAGES—WRONGFUL DEATH—MITIGATING AND AGGRAVATING CIRCUMSTANCES

6.01 Mitigating Circumstances
6.02 Aggravating Circumstances

Research References

West's Key Number Digest
Damages ⚷213, 214

A.L.R. Library
A.L.R. Index, Damages; Instructions to Jury; Mitigation or Aggravation of Damages
West's A.L.R. Digest, Damages ⚷213, 214

Legal Encyclopedias
Am. Jur. 2d, Damages § 806

6.01 [1996 Revision] Mitigating Circumstances

If your verdict is for plaintiff, then in assessing damages you may take into consideration any mitigating circumstances attendant upon the fatal injury.

Notes on Use (1965 New)

This instruction may be given by defendant where the evidence supports the submission.

Committee Comment (2002 New)

A. The Committee is unable to determine under existing Missouri law whether the doctrine of mitigation of damages/avoidable consequences (See MAI 32.29 and MAI 4.01) is applicable to wrongful death cases in addition to the statutory mitigating circumstances attending the death under § 537.090, RSMo. Thus, the Committee takes no position on such issue.

B. Pecuniary loss has not been hypothesized as an element of plaintiff's case because "where it appears in a statutory action for death that the death was caused by defendant's negligence, nominal damages may be recovered, although no actual pecuniary damage has been shown." *Stroud v. Masek*, 262 S.W.2d 47, 51 (Mo. 1953). "Judgment for nominal damages is a substantial right since such a judgment decides the incident of costs." *Id.*

See §§ 537.080 to 537.095, RSMo.

Research References

West's Key Number Digest
Damages ⚷214

Legal Encyclopedias
C.J.S., Damages §§ 197, 199

Annotations

1. In general

In wrongful death action against asbestos manufacturers, manufacturers were not precluded from requesting instruction on mitigation of damages simply because plaintiffs exercised their option of not requesting instruction on aggravating circumstances. *Hagen v. Celotex Corp.*, 816 S.W.2d 667 (Mo.banc 1991).

Trial court committed reversible error in vehicle collision case in which only damages were at issue by submitting non-Missouri Approved Instruction (MAI) that included elements of both comparative fault and mitigation of damages and allowed jury to assess percentage of fault to passenger for failing to mitigate damages; MAI 6.01 was available, instruction used was not supported by either facts or evidence, and instruction allowed jury to confuse issues of fault with issue of mitigation. *Tillman v. Supreme Express & Transfer, Inc.*, 920 S.W.2d 552 (Mo.App. E.D. 1996).

6.02 [1998 Revision] Aggravating Circumstances

Where aggravating circumstances are submitted in a wrongful death case, select an exemplary damage instruction from Chapter 10.00 that fits the theory of the case (e.g., intentional tort, negligence, strict liability, etc.) and substitute the phrase "damages for aggravating circumstances" for the phrase "punitive damages" in the Chapter 10.00 instruction selected.

For example, if a wrongful death case is submitted on a negligence theory, MAI 10.02 would be selected to submit aggravating circumstances in the following, modified form:

> If you find in favor of plaintiff under Instruction Number ________ *(here insert number of plaintiff's verdict directing instruction based on negligence)*, and if you believe the conduct of defendant as submitted in Instruction Number ________ *(here insert number of plaintiff's verdict directing instruction based on negligence)* showed complete indifference to or conscious disregard for the safety of others, then in addition to any damages to which you may find plaintiff entitled under Instruction Number ________ *(here insert number of plaintiff's damage instruction)* you may award plaintiff an additional amount as damages for aggravating circumstances in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

The burden of proof instruction (MAI 3.01) and the verdict form from Chapter 36.00 (MAI 36.11) would be modified similarly by substituting the phrase "damages for aggravating circumstances" for the phrase "punitive damages."

Committee Comment (2008 Revision)

A. See *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo.banc 1995).

B. Where issues of "harm to others" arise in the context of aggravating circumstances in a wrongful death case, the requirements of the Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007), will be implicated. See the bracketed paragraph and accompanying Note on Use 1 to MAI 10.02 for appropriate modification of an instruction submitting "damages for aggravating circumstances" in such cases.

Research References

West's Key Number Digest
Damages ⚷213

Annotations

1. In general

Instruction should inform jury that award for aggravating circumstances should be in such sum as is believed will serve to punish defendant and deter defendant and others from like conduct. *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo.banc 1995).

Aggravating-circumstance damages must be set out separately from actual damages in verdict form, but form should not set forth separate line for reduction by mitigating circumstances; once punitive damages become issue in wrongful death action, mitigating evidence may be adduced. *Bennett v. Owens-Corning Fiberglas Corp.*, 896 S.W.2d 464 (Mo.banc 1995).

7.00

DAMAGES—JOINT TORT-FEASORS

7.01 Deduction for Admitted Settlement With Joint Tort-Feasor [Withdrawn 1983]
7.02 Disputed Partial Settlement

Research References

West's Key Number Digest
Damages 🔑210(1); Torts 🔑149

A.L.R. Library
West's A.L.R. Digest, Damages 🔑210(1); Torts 🔑149

7.01 [1983 Withdrawn] Deduction for Admitted Settlement With Joint Tort-Feasor

Committee Comment (1983 Revision)

A. (See Committee Comment to MAI 1.06 for a discussion of the reasons for the withdrawal of MAI 7.01 and for the procedure now to be followed).

7.02 [1983 Revision] Disputed Partial Settlement

The following addendum must be added to the appropriate damage instruction (MAI 4.01 to 5.01) when there is a disputed issue as to whether there has been a settlement payment, as to whether a certain payment was attributable to a settlement or if the amount of the settlement payment is disputed:

In determining the amount of plaintiff's damages you are not to consider any evidence of prior payment made [to] [on behalf of][1] plaintiff. The judge will consider any such payment and adjust your award as required by law.

If you believe *(state the name)* previously paid plaintiff some amount on plaintiff's claim, then you must find the amount which you believe *(state the name)* paid on plaintiff's claim.

Notes on Use (1983 Revision)

1. Select the appropriate bracketed phrase; if both are appropriate, use both in the disjunctive.

Use verdict form 36.19 with this addendum. When the verdict is returned, the trial judge will take any finding of settlement payments into consideration and will give credit for any amount allowable as a credit.

Neither MAI 7.02 nor MAI 34.05 is to be used to submit the affirmative defense of complete release. Use an appropriate affirmative defense instruction, such as MAI 32.21, to submit this issue.

Committee Comment (1983 Revision)

A. For advance payments under § 490.710, RSMo, or undisputed settlement payments, see MAI 1.06.

Research References

West's Key Number Digest
Damages 🔑210(1); Torts 🔑149

8.00

DAMAGES—FEDERAL EMPLOYERS' LIABILITY ACT

8.01 Death of Employee under F.E.L.A. [Withdrawn 2012]
8.02 Injury to Employee [Withdrawn 2012]

Historical Note

(All F.E.L.A. Instructions have been collected in Chapter 24 of MAI-Civil. MAI 8.01 has been replaced by MAI 24.06 (2012 Revision) and MAI 8.02 has been replaced by MAI 24.07 (2012 Revision)).

8.01 [2012 Withdrawn] Death of Employee under F.E.L.A.

Historical Note

(MAI 8.01 and its related Notes on Use and Committee Comment have been withdrawn. All instructions related to the Federal Employers' Liability Act have been collected in Chapter 24 of MAI-Civil. MAI 8.01 has been replaced by MAI 24.06 (2012 Revision)).

8.02 [2012 Withdrawn] Injury to Employee

Historical Note

(MAI 8.02 and its related Notes on Use and Committee Comment have been withdrawn. All instructions related to the Federal Employers' Liability Act have been collected in Chapter 24 of MAI-Civil. MAI 8.02 has been replaced by MAI 24.07 (2012 Revision)).

9.00

EMINENT DOMAIN

9.01 Damages—All Property Taken
9.02 Damages—Part of Property Taken
9.03 Burden of Proof
9.04 Verdict Directing—Where Authority Claims "No Damage" From Taking
9.05 Withdrawal Instructions—General Benefits
9.06 Illustration—All Property Taken
9.07 Illustration—Part of Property Taken—Evidence of Damage to Remainder

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Research References

West's Key Number Digest
Damages 🔑215(1)

A.L.R. Library
A.L.R. Index, Damages; Exemplary Damages; Instructions to Jury; Negligence; Strict or Absolute Liability
West's A.L.R. Digest, Damages 🔑215(1)

Legal Encyclopedias
Am. Jur. 2d, Damages §§ 584, 617 to 619; Products Liability § 1620
C.J.S., Damages §§ 238, 239

9.01 [2012 Revision] Damages—All Property Taken

You must award defendant such sum as you believe [was][1] is the fair market value of defendant's property [immediately before the taking on *(insert date of appropriation)*].[1] In determining the fair market value of defendant's property, you may consider evidence of the value of the property including [comparable sales, capitalization of income, replacement cost less depreciation,][2] the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. You may give such evidence the weight and credibility you believe are appropriate under the circumstances.

Notes on Use (2012 Revision)

1. The bracketed terms shall be used where the appropriation takes place before trial. Where the appropriation does not take place until after trial, as in some condemnations by cities, the bracketed words should be omitted.

This instruction shall be used where defendant's total property is taken so there is no issue of damages or special benefits to the remaining property.

2. Select the appropriate term(s). In some cases, there may not be evidence of a particular category of valuation referenced in § 523.001(1), RSMo (such as "capitalization of income"). In such cases, during the instruction conference, the parties and the court may (on the record) agree to modify this instruction by deleting reference to those methods of valuation for which evidence has not been presented. However, since the Legislature determined the content of § 523.001(1) and § 523.060.2, RSMo, failure to delete such a category should not be considered error.

Committee Comment (2012 Revision)

A. This instruction incorporates the provisions of § 523.001(1), RSMo, as required by § 523.060.2, RSMo. Application of "heritage value" and "homestead taking" provisions of § 523.001(2) and (3), § 523.039, and § 523.061, RSMo, is a judicial function, not a jury function.

B. A claim for damages may exist for pre-condemnation blight where the threat of eminent domain has resulted in lost income, diminished property values and other costs. See *Clay Cty. Realty Co. v. City of Gladstone*, 254 S.W.3d 859 (Mo.banc 2008).

Research References

West's Key Number Digest
Eminent Domain ⚷222(5)

Legal Encyclopedias
C.J.S., Eminent Domain §§ 370, 371, 375

9.02 [2012 Revision] Damages—Part of Property Taken

You must award defendant such sum as you believe [was][1] is the difference between the fair market value of the entire property [immediately before the taking on *(insert date of appropriation)*][1] and the fair market value of the remaining [burdened][2] property [immediately after the taking].[1] In determining the fair market value of defendant's property, you may consider evidence of the value of the property including [comparable sales, capitalization of income, replacement cost less depreciation,][3] the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. You may give such evidence the weight and credibility you believe are appropriate under the circumstances.

Notes on Use (2012 Revision)

1. The bracketed terms shall be used where the appropriation takes place before trial. Where the appropriation does not take place until after the trial, as in some condemnations by cities, the bracketed words should be omitted.

2. Select the appropriate term.

See MAI 9.05 for withdrawal of general benefits.

Where the condemning authority offers evidence that the property owner sustained no damage from the taking, MAI 9.04 must also be given.

3. Select the appropriate term(s). In some cases, there may not be evidence of a particular category of valuation referenced in § 523.001(1), RSMo (such as "capitalization of income"). In such cases, during the instruction conference, the parties and the court may (on the record) agree to modify this instruction by deleting reference to those methods of valuation for which evidence has not been presented. However, since the Legislature determined the content of § 523.001(1) and § 523.060.2, RSMo, failure to delete such a category should not be considered error.

Committee Comment (2012 Revision)

A. This instruction shall be used where only part of defendant's property is taken. It authorizes damages for the value of the property condemned and the resulting damage to the remaining property. This instruction is appropriate whether or not special benefits to defendant's remaining property are in issue.

B. This instruction incorporates the pertinent provisions of § 523.001(1), RSMo, as required by § 523.060.2, RSMo. Application of "heritage value" and "homestead taking" provisions of § 523.001(2) and (3), § 523.039, § 523.061, RSMo, is a judicial function, not a jury function.

Research References

West's Key Number Digest
Eminent Domain ⚷222(5)

Legal Encyclopedias
C.J.S., Eminent Domain §§ 370, 371, 375

Annotations

Anticipated damage 6
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1. Modification

It was appropriate to modify MAI 9.02 to instruct the jury as to the measure of damages for a claim made against a title insurance policy. *Spalding v. Stewart Title Guar. Co.*, 463 S.W.3d 770 (Mo.banc 2015).

Condemnation by constitutional charter cities is subject to rules of civil procedure, and the use of MAI 9.02 is mandatory. *Bueche v. Kansas City*, 492 S.W.2d 835 (Mo.banc 1973).

Where there was no open market for condemned school property MAI 9.02 was properly modified by deleting the words "fair market." *Reorganized Sch. Dist. v. Mo. Pac. R.R. Co.*, 503 S.W.2d 153 (Mo.App. 1973).

MAI 9.02 is mandatory in case where plaintiff condemns easement across defendant's land, and may not be modified by changing "property taken" to "rights taken." *State ex rel. Kansas City Power & Light Co. v. Campbell*, 433 S.W.2d 606 (Mo.App. 1968).

2. Special benefits

Permissible but not mandatory. Where condemnee objected to court's erroneous admission of evidence of general benefits, condemnee did not waive the error by failing to offer a withdrawal instruction. State ex rel. *State Highway Comm'n v. Johnson*, 544 S.W.2d 276 (Mo.App. 1976).

Instruction on presumption of special benefits properly refused where court has MAI 9.02, which allows the question to be considered only by argument, as indicated in Committee's Comment. *Kansas City v. Cone*, 433 S.W.2d 88 (Mo.App. 1968).

3. Permanent nuisance

In suit to recover damages for permanent nuisance, the correct measure of damages is based on before and after values and is improperly submitted by MAI 4.01. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970).

In action for permanent nuisance, the correct damages instruction is MAI 9.02, not MAI 4.02. *Scantlin v. City of Pevely*, 741 S.W.2d 48 (Mo.App. E.D. 1987).

MAI 4.01 is proper for damages for temporary nuisance and MAI 9.02 is proper for damages for permanent nuisance. *Spain v.*

City of Cape Girardeau, 484 S.W.2d 498 (Mo.App. 1972).

In permanent nuisance case, sole damage issue was diminution of value; as in condemnation cases, MAI 9.02 was proper and MAI 4.01 improper. *Stewart v. City of Marshfield*, 431 S.W.2d 819 (Mo.App. 1968).

4. Capitalization method

Where there was no evidence of reasonable market value of cemetery, court erred in giving MAI 9.02 and 15.01 (now 16.02) and should have submitted not-in-MAI damage instruction drafted on the capitalization method. *State ex rel. State Highway Comm'n v. Mount Moriah Cemetery Ass'n*, 434 S.W.2d 470 (Mo. 1968).

MAI 9.02 and its fair market value definition are not designated for cases in which valuation is based on capitalization method. *State ex rel. Mo. Highway and Transp. Comm'n V. McDonald's Corp.*, 896 S.W.2d 652 (Mo.App. E.D. 1995).

Where there was no open market for condemned school property, MAI 9.02 was properly modified by deleting the words "fair market." *Reorganized Sch. Dist. No. 2 v. Mo. Pac. R.R. Co.*, 503 S.W.2d 153 (Mo.App. 1973).

5. Conversing damages

In condemnation suit where there was no evidence of special benefits, some damage is presumed, and it was error to give plaintiff's MAI 33.03(3) conversing damages since that converse is designed to converse the damage element of a plaintiff's verdict director in a suit for damages, not the plaintiff's measure of damage instruction, which cannot be conversed. *City of Gladstone v. Hamilton*, 463 S.W.2d 622 (Mo.App. 1971).

6. Anticipated damage

MAI 4.01, instructing jury to award such sum as it believes will fairly and justly compensate plaintiff for damages that plaintiff sustained and is reasonably certain to sustain in future as a direct result of occurrence, rather than MAI 9.02, addressing eminent domain damages for taking of part of property, is appropriate when damage goes beyond mere property loss. *Shady Valley Park & Pool, Inc. v. Fred Weber, Inc.*, 913 S.W.2d 28 (Mo.App. E.D. 1995).

In condemnation case, court properly refused to withdraw evidence of construction damage that could have been anticipated at time of taking. *Ne. Mo. Elec. Power Co-op v. Cary*, 485 S.W.2d 862 (Mo.App. 1972).

7. Multiple verdicts

Where two condemnation exceptions were consolidated for trial and separate verdicts were required, it was not error to give two separate MAI 9.02 damage instructions each referring to a separate tract. *M&A Electric Power Co-op v. True*, 480 S.W.2d 310 (Mo.App. 1972).

8. Inverse condemnation

Owners sued utility for actual and punitive damages for unlawful entry onto their land, and utility counterclaimed for condemnation. Owners submitted MAI 9.02 for actual damages and MAI 10.01 for punitive damages, but erroneously offered no instruction on the basic essential element of trespass. *Keeven v. St. Charles Cty. Utils. Co., Inc.*, 542 S.W.2d 349 (Mo.App. 1976).

9. Valuation

Trial court properly gave MAI instructions 16.02 and 9.02 on market value in eminent domain proceeding and properly refused landowner's proffered instruction that jurors were to assume that the condemnor would make the fullest use of its right-of-way and use it in a manner as injurious to landowner's remaining rights as would be permitted. *City of Kansas City v. Habelitz*, 857 S.W.2d 299 (Mo.App. W.D. 1993).

Damages in a condemnation case are temporarily restricted in that they are to be determined with a reference to the time of construction. *State ex rel. Mo. Highway and Transp. Comm'n v. McNary*, 664 S.W.2d 589, 592–593 (Mo.App. W.D. 1984).

9.03 [2017 Revision] Burden of Proof

The burden is on the defendant to cause you to believe that defendant has sustained damage and the amount thereof. In determining the amount of your verdict, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

Notes on Use (2008 New)

A burden of proof instruction must be given in every case. MAI 9.03 is to be used in all eminent domain cases.

Committee Comment (2008 New)

A. The Committee believes that in the usual eminent domain case the issues are sufficiently distinctive to have a special burden of proof instruction, MAI 9.03. In more complicated eminent domain cases in which there may be issues of special benefits, complete affirmative defenses, avoidance of affirmative defenses, etc., the general burden of proof instruction, MAI 3.01, should be used. The court should then exercise care in supervising arguments of counsel to ensure that such arguments are consistent with the applicable law. This approach in more complicated cases obviates the need for modification to the burden of proof instruction referenced in *State ex rel. Mo. Highway and Transportation Commission. v. Buys*, 909 S.W.2d 735 (Mo.App. W.D. 1995).

Historical Note

(MAI 9.03 replaces the prior MAI 3.02 from the 6th Edition).

Research References

West's Key Number Digest
Eminent Domain ⚷222(1)

Legal Encyclopedias
C.J.S., Eminent Domain §§ 346, 347, 350, 351

Annotations

1. In general

Absence of burden-of-proof clause compels reevaluation of MAI 3.02, but giving in original form not error. *State ex rel. State Highway Comm'n v. Sams*, 484 S.W.2d 276 (Mo. 1972).

Giving MAI 3.01 in condemnation case, tried prior to adoption of MAI 3.02, was not error. *State ex rel. State Highway Comm'n v. DeLisle*, 462 S.W.2d 641 (Mo. 1971).

2. Mandatory instruction

Giving MAI 3.02 in condemnation case is mandatory. *State ex rel. State Highway Comm'n v. Nickerson & Nickerson, Inc.*, 494 S.W.2d 344 (Mo. 1973).

3. Amendment

In a condemnation action remanded for retrial to be held after July 1, 1973, the revised version of MAI 3.02 must be used. *State ex rel. State Highway Comm'n v. Baker*, 505 S.W.2d 433 (Mo.App. 1974).

9.04 [2008 New] Verdict Directing—Where Authority Claims "No Damage" From Taking

Your verdict must be for defendant if you believe that defendant has been damaged by either or both of the following:

1. The taking of the property [rights].[1]

2. The use[s] that plaintiff has the right to make of the property [rights][1] taken.

* [unless you believe defendant is not entitled to recover by reason of Instruction Number ________________ *(here insert number of affirmative defense instruction)*].

Notes on Use (2008 New)

1. Use bracketed term where easements, etc., are taken rather than the fee.

This verdict directing instruction is to be used only in condemnation cases where the condemning authority offers evidence that the property owner sustained no damage from the taking.

*Add if affirmative defense is submitted.

Historical Note

(MAI 9.04 replaces the prior MAI 31.05 from the 6th Edition).

Research References

West's Key Number Digest
Eminent Domain ⚷222(5)

Annotations

1. In general

In condemnation proceeding where condemning authority acknowledged that property owners sustained some damages, instruction patterned from MAI 31.05 (now 9.04) would be improper and was properly refused. *City of Lake Ozark v. Campbell*, 745 S.W. 2d 799 (Mo.App. S.D. 1988).

MAI 26.05 (formerly 31.05 and now 9.04) improper where condemnor concedes defendant suffered some damage by the taking. *State ex rel. Kansas City Power & Light Co. v. Campbell*, 433 S.W.2d 606 (Mo.App. 1968).

9.05 [2008 New] Withdrawal Instructions—General Benefits

In determining the value of defendant's remaining property, you must not consider any general benefit that is conferred upon all property within usable range of *(here describe the improvement that is the subject matter of the action; e.g., the proposed highway, park, etc.)*.

Notes on Use (2008 New)

This may be given as a separate instruction or as an addition to the general damage instruction, at the option of defendant. Evidence of general benefits should be excluded upon proper objection, but the withdrawal instruction should nevertheless be proper, because the jury would otherwise take them into consideration in determining fair market value.

If there is evidence of general detriments, they may be withdrawn in the same way.

If specific evidence of general benefits is improperly admitted, such evidence may be withdrawn by an instruction patterned after MAI 34.02. MAI 9.05 may be used in addition thereto.

While MAI 9.05 is called a "withdrawal" instruction, its use is not limited to withdrawing evidence that is accidentally or improperly admitted. It is intended, rather, to clarify what the jury is to consider in assessing damages. Instructions patterned after MAI 34.02 are intended to withdraw a specific matter that might otherwise mislead the jury. MAI 9.05 may be given at the defendant's option while MAI 34.02 may be given only at the discretion of the trial judge.

Historical Note

(MAI 9.05 replaces the prior MAI 34.03 from the 6th Edition).

Research References

West's Key Number Digest
Eminent Domain ⚷222(1)

Annotations

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Mandatory 2

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1. In general

Even where there was no evidence of general benefits, giving MAI 34.03 (now 9.05) was proper. *State ex rel. Highway Comm'n v. Sams*, 484 S.W.2d 276 (Mo. 1972).

Where defendant gave MAI 30.02 (formerly 34.03 and now 9.05), excluding consideration of general benefits to remaining tract, he cured error in admitting evidence of general benefits. *State ex rel. State Highway Comm'n v. Riss*, 432 S.W.2d 193 (Mo. 1968).

In condemnation action, trial court should have given county's proposed instruction stating that, in determining the value of landowner's remaining property, jury must not consider any general benefit that is conferred upon, or any general detriment suffered by, all property within usable range of the road improvement project. *St. Charles Cty. v. Olendorff*, 234 S.W.3d 492 (Mo.App. E.D. 2007).

In condemnation action, trial court's error in not giving county's proposed instruction statin that, in determining the value of landowner's remaining property, jury must not consider any general benefit that is conferred upon, or any general detriment suffered by, all property within usable range of the road improvement project was harmless; although instruction included references to general benefits, as well as general detriments, nowhere on appeal had the county identified specific evidence of general benefits to which jury was exposed or described how, in the absence of instruction, such evidence prejudiced county. *St. Charles Cty. v. Olendorff*, 234 S.W.3d 492 (Mo.App. E.D. 2007).

Finding of trial court error where the trial court refuses to submit a plaintiff-requested instruction providing that, in determining the value of defendant's remaining property in condemnation action, jury must not consider any general benefit that is conferred upon all property within usable range of the improvement, does not require reversal; instead, there must be determination of whether the error is prejudicial. *St. Charles Cty. v. Olendorff*, 234 S.W.3d 492 (Mo.App. E.D. 2007).

Trial court's failure to give instruction requested by owner in partial condemnation proceeding precluding consideration of evidence of general benefit as offset against owner's damages was not prejudicial, and did not require reversal; evidence was presented of improvement in the highest and best use of owner's land due to highway construction, which is quintessential example of "special benefit," as opposed to "general benefit." *State ex rel. Mo. Highway & Transp. Comm'n v. Edelen*, 872 S.W.2d 551 (Mo.App. E.D. 1994).

In condemnation proceedings, any error in admitting evidence of general benefits was cured when MAI 34.03 was given; withdrawal and exclusion of erroneously admitted evidence leaves no ground for reversing judgment on account of such admission. *State ex rel. Mo. Highway and Transp. Comm'n v. Jim Lynch Toyota, Inc.*, 854 S.W.2d 490 (Mo.App. E.D. 1993).

Landowners' testimony in condemnation proceedings that some damages were due to general traffic congestion on widened road was specific evidence of general damages that could be withdrawn by the instruction. *State ex rel. Mo. Highway & Transp. Comm'n v. Mertz*, 778 S.W.2d 366 (Mo.App. E.D. 1989).

Permissible but not mandatory. Where condemnee objected to court's erroneous admission of evidence of general benefits, condemnee did not waive the error by failing to offer a withdrawal instruction. *State ex rel. State Highway Comm'n v. Johnson*, 544 S.W.2d 276 (Mo.App. 1976).

2. Mandatory

Error to refuse general benefit withdrawal instruction MAI 34.03 (now 9.05) when requested by defendant whether or not there is evidence of general benefits. *State ex rel. State Highway Comm'n v. S. Dev. Co.*, 509 S.W.2d 18 (Mo. 1974).

Trial court is required to give standard jury instruction preventing jury from considering evidence of general benefit as offset against owner's damage when requested by defendants in partial condemnation proceeding, regardless of whether there is evidence of general benefit. *State ex rel. Mo. Highway & Transp. Comm'n v. Edelen*, 872 S.W.2d 551 (Mo.App. E.D. 1994).

9.06 [2008 Revision] Illustration—All Property Taken

John and Mary Jones were the owners of Blackacre, which was taken by the State on July 1, 1980. Commissioners were appointed and made their award of damages. Plaintiff and defendants filed timely exceptions to the Commissioners' award. The issue of damages was tried to a jury.

Instruction No. 1

(Same as MAI 2.01)

Note: In condemnation cases, the defendant is first in the order of proof and the references to plaintiff and defendants in MAI 2.01 will be reversed. See MAI 2.01 Notes on Use.

Instruction No. 2

(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3

(See MAI 2.02)

In returning your verdict you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 4

(See MAI 9.03)

The burden is on defendants to cause you to believe that they have sustained damage and the amount thereof. In determining the amount of your verdict, you must consider only the evidence and the reasonable inferences derived from the evidence. If you do not believe certain evidence, then you cannot consider that evidence in arriving at the amount of your verdict.

Instruction No. 5

(See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction No. 6

(See MAI 9.01)

You must award defendants such sum as you believe was the fair market value of defendants' property immediately before the taking on July 1, 1980. In determining the fair market value of defendants' property, you may consider evidence of the value of the property including comparable sales, capitalization of income, replacement cost less depreciation, the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. You may give such evidence the weight and credibility you believe are appropriate under the circumstances.

VERDICT A

(See MAI 36.01 (Modified))

We, the undersigned jurors, assess the damage of defendants at $ ________ *(stating the amount).*

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________

Committee Comment (2008 Revision)

A. In this Illustration, there is only one verdict form; as a result, all instructions are included in one package. MAI 2.05 is not to be used when there is only one verdict form. See MAI 2.00.

Historical Note

(This Illustration replaces the prior Illustration 35.08 from the 6th Edition).

Research References

West's Key Number Digest
Eminent Domain 🔑222(1)

9.07 [2008 Revision] Illustration—Part of Property Taken—Evidence of Damage to Remainder

Ajax Super Market, Inc., owned a four-acre tract of land adjacent to Highway 54. To enable it to widen the highway, the State condemned two acres of Ajax's land nearest the highway. The taking occurred on July 1, 1980. The two acres taken had been used as a parking lot. Defendant's store building is on the remaining two acres. The right of access was not disturbed. The State made no contention of special benefits. Commissioners were appointed and made their award of damages. The parties filed timely exceptions to the Commissioners' award and the case was tried to a jury. Defendant, Ajax Super Market, Inc., offered evidence of the value of the entire tract before the taking and of the value of the remainder after the taking. Defendant's witnesses took into account the severance damage to the two acres which remained after the taking because adequate parking was no longer available for super market purposes.

Instruction No. 1

(Same as MAI 2.01)

Note: In condemnation cases, the defendant is first in the order of proof and the references to plaintiff and defendant in MAI 2.01 will be reversed. See MAI 2.01 Notes on Use.

Instruction No. 2

(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3

(See MAI 2.02)

In returning your verdict you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 4

(See MAI 9.03)

The burden is on defendant to cause you to believe that it has sustained damage and the amount thereof. In determining the amount of your verdict, you must consider only the evidence and the reasonable inferences derived from the evidence. If you do not believe certain evidence, then you cannot consider that evidence in arriving at the amount of your verdict.

Instruction No. 5

(See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction No. 6

(See MAI 9.02)

You must award defendant such sum as you believe was the difference between the fair market value of the entire property immediately before the taking on July 1, 1980, and the fair market value of the remaining property immediately after the taking. In determining the fair market value of defendant's property, you may consider evidence of the value of the property including comparable sales, capitalization of income, replacement cost less depreciation, the highest and best use to which the property reasonably may be applied or adapted, the value of the property if freely sold on the open market, and generally accepted appraisal practices. You may give such evidence the weight and credibility you believe are appropriate under the circumstances.

Verdict A

(See MAI 36.01 (Modified))

We, the undersigned jurors, assess the damages of defendant at $____________________ *(stating the amount).*

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________

Committee Comment (2008 Revision)

A. In this Illustration, there is only one verdict form; as a result, all instructions are included in one package. MAI 2.05 is not to be used when there is only one verdict form. See MAI 2.00.

B. When the condemning authority has evidence from which the jury can find that the property owner sustained no damage from the taking, MAI 9.04 must be used and the verdict form used in this Illustration should be modified to require a finding in favor of plaintiff or defendant.

Historical Note

(This Illustration replaces the prior Illustration MAI 35.09 from the 6th Edition).

Research References

West's Key Number Digest
Eminent Domain ⚷222(5)

Legal Encyclopedias
C.J.S., Eminent Domain §§ 370, 371, 375

10.00

DAMAGES—EXEMPLARY

10.00 General Comment
10.01 Outrageous Conduct—Intentional Torts
10.02 Negligence Constituting Conscious Disregard for Others
10.03 Multiple Defendants
10.04 Strict Liability—Either Product Defect or Failure to Warn Submitted
10.05 Strict Liability—Both Product Defect and Failure to Warn Submitted
10.06 Both Negligence and Strict Liability Submitted
10.07 Modification of MAI 10.02—Submission of Specific Acts and Knowledge
10.08 Penalty and Attorney's Fees— Vexatious Refusal to Pay by Insurance Company

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Research References

West's Key Number Digest
Damages 🔑215(1)

A.L.R. Library
A.L.R. Index, Damages; Exemplary Damages; Instructions to Jury; Negligence; Strict or Absolute Liability
West's A.L.R. Digest, Damages 🔑215(1)

Legal Encyclopedias
Am. Jur. 2d, Damages §§ 584, 617, 619; Products Liability § 1620
C.J.S., Damages §§ 238, 239

10.00 [2012 New] General Comment

The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230, RSMo (repealed by H.B. 393), and (2) possibly the revisions by H.B. 393 with respect to punitive damages in § 510.265 or § 537.067, RSMo, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067, RSMo, on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Research References

West's Key Number Digest
Damages 🔑215(1)

10.01 [2008 Revision] Outrageous Conduct—Intentional Torts

If you find the issues in favor of plaintiff, and if you believe the conduct of defendant as submitted in Instruction Number ________ *(here insert number of plaintiff's verdict directing instruction)* was outrageous because of defendant's evil motive or reckless indifference to the rights of others, then in addition to any damages to which you find plaintiff entitled under Instruction Number ________ *(here insert number of plaintiff's damages instruction)*, you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant's conduct was outrageous. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.][1]

Notes on Use (2008 Revision)

1. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

Rule 71.06 provides in part:

> "When exemplary or punitive damages are allowed by the jury, the amount thereof shall be separately stated in the verdict."

Where the claim for actual damages is submitted on negligence as opposed to an intentional tort, MAI 10.01 is not applicable; use MAI 10.02 or MAI 10.07, whichever is appropriate. *Sharp v. Robberson*, 495 S.W.2d 394 (Mo.banc 1973). Where the claim for actual damages is submitted on strict liability as opposed to intentional tort or negligence, use MAI 10.04 or MAI 10.05, whichever is appropriate. *Racer v. Utterman*, 629 S.W.2d 387 (Mo.App. E.D. 1981). Where the claim for actual damages is submitted on negligence and strict liability, use MAI 10.06.

Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo.banc

1990), the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

The "clear and convincing" standard of proof for punitive damages adopted by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo.banc 1996), has been incorporated into the burden of proof instruction MAI 3.01.

Committee Comment (2012 Revision)

A. In *Burnett v. Griffith*, 769 S.W.2d 780 (Mo.banc 1989), the court adopted this instruction for the submission of punitive damages in intentional tort cases and held that the definition of "legal malice" in MAI 16.01 should no longer be used.

B. See MAI 4.15 and 4.16 for submission of punitive damages in libel and slander cases.

C. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Research References

West's Key Number Digest
Damages ⚷215(1)

Legal Encyclopedias
C.J.S., Damages §§ 238, 239

Annotations

In general	**1**
Actual damages	**2**
Conversion	**9**
Due process	**10**
Evidentiary support	**4**
Malice	**7**
Modification	**6**
Pleading	**3**
Slander	**8**
Trespass	**5**

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1. In general

MAI 10.01 [1978 Revision] does not clearly articulate the circumstances justifying punitive damages in a case of intentional tort, and hereafter should not be used. *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo.banc 1989).

Instruction permitting jury to determine amount of punitive damages was improper in first stage of bifurcated trial against liability insurer for bad faith failure to settle within policy limits; such instruction should only be given in the second stage of trial. *Advantage Bldgs. & Exteriors, Inc. v. Mid-Continent Cas. Co.*, 449 S.W.3d 16 (Mo.App. W.D. 2014).

Counsel's attempt at questioning prospective jurors in bifurcated trial regarding their willingness to award punitive damage, by reading language from MAI 10.01, then asking venire whether they would be able to follow the law as instructed by the trial court, was proper; counsel was not attempting to declare what the law would be but, rather, whether venire would follow an instruction on punitive damages if given by the court. *Ashcroft v. TAD Res. Int'l*, 972 S.W.2d 502 (Mo.App. W.D. 1998).

Pattern jury instruction on punitive damages did not violate due process clause; instruction gave jury sufficient guidance in determining imposition and amount of damages, punitive damage submissions did not require clear and convincing evidence, and instruction required jury to reasonably relate award to degree and character of wrongdoing. *Moore v. Mo.-Neb. Express, Inc.*, 892 S.W.2d 696 (Mo.App. W.D. 1994).

MAI 10.01 does not overrule cases which have held that punitive damages require wilful, wanton, or malicious culpable mental state; rather, word "outrageous" in instruction focuses on matter of moral culpability so that jury will not impose punitive sanction on defendant for mere commission of intentional tort. *Ryburn v. Gen. Heating & Cooling, Co.*, 887 S.W.2d 604 (Mo.App. W.D. 1994).

In false imprisonment suit by doctor against hospital and security guards, instruction offered by doctor regarding punitive damages was not erroneous where instruction was patterned after model jury instructions and only variation was substitution of "a defendant" or "any defendant" in place of "defendant" because suit involved multiple defendants. *Desai v. SSM Health Care*, 865 S.W.2d 833 (Mo.App. E.D. 1993).

MAI 10.01 does not improperly lack limits on the amount of a punitive damage award, and it does not fail to require a relationship between actual damages sustained and the amount of punitive damages award; even though a jury has great discretion in fixing the amount of punitive damages, the review by the trial or appellate courts provides a reasonable constraint on the amount of the punitive damage award. *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346 (Mo.App. E.D. 1993).

In an intentional tort action, punitive damages may be awarded if defendant's conduct is shown to be outrageous because of defendant's evil motive or reckless indifference to the rights of others. *Northland Ins. Co. v. Chet's Tow Serv., Inc.*, 804 S.W.2d 54 (Mo.App. W.D. 1991).

Punitive damages award was not appropriate in false arrest case absent any evidence in record that defendant's conduct was outrageous or indication that it had an evil motive or displayed reckless indifference to the rights of others. *Signorino v. Nat'l Super Mkts.*, 782 S.W.2d 100 (Mo.App. E.D. 1989).

Where evidence for both of plaintiff's tortious interference claims concerned defendant franchisers' course of conduct relating to operation of franchise and effect of their activities on plaintiff's interest, separate instructions on punitive damages were not required. *Honigmann v. Hunter Grp., Inc.*, 733 S.W.2d 799 (Mo.App. E.D. 1987).

Error to submit only *one* punitive damage instruction covering *two* verdict directors. *Breece v. Jett*, 556 S.W.2d 696 (Mo.App. 1977).

Error to give both MAI 4.01 for actual damages arising from negligence and MAI 10.01 for punitive damages arising from wilfulness since the theories of recovery are incompatible. *Ervin v. Coleman*, 454 S.W.2d 289 (Mo.App. 1970).

2. Actual damages

Although ordinary negligence is inconsistent with "willful, wanton or malicious" conduct (MAI 10.01), it is not inconsistent with "complete indifference to or conscious disregard for the safety of others" (MAI 10.02). Hence, plaintiff may submit both actual damages, by MAI 4.01, and punitive damages, by MAI 10.02, but not by MAI 10.01. *Sharp v. Robberson*, 495 S.W.2d 394 (Mo.banc 1973).

To entitle plaintiff to punitive damages under MAI 10.01, there must be evidence of actual damages. *Ervin v. Coleman*, 454 S.W.2d 289 (Mo.App. 1970).

3. Pleading

Pleading warranted submission of punitive damages although not in precise words of MAI 10.01. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970).

4. Evidentiary support

In false imprisonment suit against hospital and security guards, doctor was entitled to punitive damages instruction where doctor testified that one guard called doctor a derogatory name and that guards pushed doctor's head against trunk of car, and guards detained doctor because he accused one guard of assault, not because guards believed doctor had trespassed. *Desai v. SSM Health Care*, 865 S.W.2d 833 (Mo.App. E.D. 1993).

Evidence that automobile manufacturer, which sold damaged car as new, had offered to replace it was admissible to mitigate punitive damages sought by buyers; buyers would also be allowed to present evidence regarding timing and prompting of offer, with ultimate weight given to fact that replacement offer was made being determined by jury. *Maugh v. Chrysler Corp.*, 818 S.W.2d 658 (Mo.App. W.D. 1991).

In false imprisonment claim, evidence was sufficient to support that the conduct of defendant was prompted by ill will, spite, or grudge. *Wilton v. Cates*, 774 S.W.2d 570, 572 (Mo.App. W.D. 1989).

In fraud case, evidence warranted instruction on exemplary damages. *Throckmorton v. M.F.A. Cent. Co-op.*, 462 S.W.2d 138 (Mo.App. 1970).

5. Trespass

Approved punitive damage instruction in trespass case. *Hawkins v. Burlington N., Inc.*, 514 S.W.2d 593 (Mo.banc 1974).

Defendant's conduct following its initial trespass of inadvertently digging trench across plaintiff's property, in allowing trench to remain open for several days with sink water present therein while parties negotiated over purchase of easement, was not sufficiently "outrageous" and did not manifest the "reckless indifference" required for award of punitive damages. *White v. James*, 848 S.W.2d 577 (Mo.App. S.D. 1993).

Evidence that landlord's agents told tenant that they could do anything they wanted to when tenant complained about agents' intrusions upon leased agricultural property was sufficient to show that landlord had evil motive or was recklessly indifferent to tenant's rights, as required to support submission of punitive damages issue to jury in action based on alleged trespass. *Davis v. Jefferson Sav. & Loan Ass'n*, 820 S.W.2d 549 (Mo.App. E.D. 1991).

6. Modification

Modifying MAI 10.01 by substituting "defendants" for "defendant" is not a proper instruction for submission of punitive damages against multiple defendants since it does not include provisions of MAI 10.03, the appropriate punitive damage charge for multiple defendants, whereby defendants are accorded their right to have their conduct considered separately and the amounts assessed as punitive damages, if any, may be different or the same. *Saunders v. Flippo*, 639 S.W.2d 411 (Mo.App. E.D. 1982).

7. Malice

MAI 16.01, a definition of malice in law, does not adequately express degree of culpability required for an award of punitive damages in a malicious prosecution case arising from a civil proceeding. Instead, the jury must be instructed that in order to award punitive damages, "the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based." *Proctor v. Stevens Emp't Servs., Inc.*, 712 S.W.2d 684 (Mo.banc 1986).

MAI 16.01 does not adequately express the degree of culpability required for punitive damages in malicious prosecution cases. *Sanders v. Daniel Int'l Corp.*, 682 S.W.2d 803 (Mo.banc 1984).

To recover punitive damages in a case of false arrest, plaintiff must prove malice; that proof must entail showing of ill will, spite, or grudge, either toward injured person or toward all persons in the group of which injured person is a member. *Hollingsworth v. Quick*, 770 S.W.2d 291, 296 (Mo.App. W.D. 1989).

In case of false arrest, court improperly instructed jury on legal definition of malice, MAI 16.01, because a definition of actual malice is required. *Stewart v. K-Mart Corp.*, 747 S.W.2d 205 (Mo.App. E.D. 1988).

Where defendant's instruction defining legal but not actual malice was submitted to jury on issue of punitive damages for both assault and malicious prosecution claims, it was error because proper standard for awarding punitive damages in a malicious prosecution case arising out of a criminal proceeding is actual malice. *Schoor v. Wilson*, 731 S.W.2d 308 (Mo.App. W.D. 1987).

8. Slander

MAI 10.01 is not the instruction to be given to the jury in an action brought for slander. *Joseph v. Elam*, 709 S.W.2d 517, 525 (Mo.App. E.D. 1986).

9. Conversion

Purported prospective buyers of automobile failed to present evidence sufficient to support submission of punitive damages to jury on conversion claim against credit corporation that took possession of automobile; although corporation's order of delivery was void because of absence of particular fact allegations in supporting affidavit, and while order was no defense to conversion claim, it tended to negate evil motive and reckless indifference on part of corporation. *Ross v. Ford Motor Credit Co.*, 867 S.W.2d 546 (Mo.App. W.D. 1993).

Evidence supported award of punitive damages in amount of $5,000 against towing company for conversion of trailer when it refused owner's cashier's check for more than amount owing for towing and storage, where towing company lied about its charges, changed amount due without valid explanation when owner sought to take possession of trailer, refused cashier's check because competitor had been sent to take delivery of the trailer, and attempted to double bill for towing service. *Northland Ins. Co. v. Chet's Tow Serv., Inc.*, 804 S.W.2d 54 (Mo.App. W.D. 1991).

10. Due process

Award of punitive damages did not violate due process clause where trial court gave MAI 10.01; this instruction provides a sufficient standard to guide jurors in their determination of what conduct supports an award of punitive damages; the standards for imposition of punitive damages under MAI 10.01 are not unconstitutionally vague. *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346 (Mo.App. E.D. 1993).

10.02 [2008 Revision] Negligence Constituting Conscious Disregard for Others

If you find in favor of plaintiff under Instruction Number ________ *(here insert number of plaintiff's verdict directing instruction based on negligence)*, and if you believe the conduct of defendant as submitted in Instruction Number ________ *(here insert number of plaintiff's verdict directing instruction based on negligence)* showed complete indifference to or conscious disregard for the safety of others, then in addition to any damages to which you may find plaintiff entitled under Instruction Number ________ *(here insert number of plaintiff's damage instruction)* you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.][1]

Notes on Use (2008 Revision)

1. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

This is the appropriate instruction in a case where exemplary damages are submissible in connection with a claim for actual damages based on negligence as opposed to intentional tort or strict liability. *Sharp v. Robberson*, 495 S.W.2d 394 (Mo.banc 1973).

Caution: Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo.banc 1990), MAI 10.02 will not be adequate to submit punitive damages under the following circumstances:

(i) *Where the verdict directing instruction contains alternative submissions of negligence but fewer than all submis-*

sions will support a punitive damage instruction. Under these circumstances, *Menaugh* suggests that the punitive damage instruction be limited to that portion of the verdict director that requires the jury to find the essential mental element. *Id.* at 74, 75.

(ii) *Where the verdict directing instruction contains a single submission of negligence but the evidence demonstrates alternate sets of facts, both of which support the submission, but only one of which will support punitive damages.* Under these circumstances, *Menaugh* suggests the addition of such additional facts to MAI 10.02 as are necessary to justify a punitive damage submission. *Id.* at 74, 75.

(iii) *Where the verdict directing instruction does not contain a submission on the issue of defendant's "knowledge."* Under these circumstances, *Menaugh* states that MAI 10.02 is inadequate because it does not require the jury to find the essential mental element. *Id.* at 74. *Menaugh* recognizes that those verdict directing instructions such as the "premises liability" instruction in *Sharp* will be sufficient to submit the issue of defendant's "knowledge" and may then be followed by MAI 10.02 without modification. *Id.* at 74. For further discussion of the "knowledge" issue, see *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc./ Special Products, Inc.*, 700 S.W.2d 426 (Mo.banc 1985).

The problems addressed in *Menaugh* should be resolved by utilization of MAI 10.07.

Such problems should not arise when using MAI 10.04 [Strict Liability – Either Product Defect or Failure to Warn Submitted] or MAI 10.05 [Strict Liability – Both Product Defect and Failure to Warn Submitted] but may arise when using MAI 10.06 [Both Negligence and Strict Liability Submitted] in the context of the negligence submission. If such a problem arises in using MAI 10.06, counsel should adapt that portion of MAI 10.06 relating to negligence with the method of submission demonstrated by MAI 10.07.

See MAI 10.01 for submission of punitive damages in connection with an intentional tort.

Under *Menaugh*, the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

Where punitive damages are submitted in a case involving only pecuniary harm, without bodily injury, this instruction may be modified by substituting the phrase "rights of others" for the phrase "safety of others." *Haynam v. Laclede Elec. Coop., Inc.*, 889 S.W.2d 148 (Mo.App. S.D. 1994).

The "clear and convincing" standard of proof for punitive damages adopted by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo.banc 1996), has been incorporated into the burden of proof instruction, MAI 3.01.

Committee Comment (2012 Revision)

A. Existing MAI 10.01 fits some cases but does not fit the drunken driver case.

B. In *Nichols v. Bresnahan*, 357 Mo. 1126, 1130–31, 212 S.W.2d 570, 573 (1948), the court cited with approval Restatement of Torts § 500 (1935), as follows:

> The actor's (defendant's) conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.

C. The court approved an instruction requiring a finding that defendant's conduct exhibited "a conscious disregard and indifference to the. . . consequences." *Id.*

D. In *Evans v. Illinois Central Railroad Co.*, 289 Mo. 493, 233 S.W. 397, 400 (Mo.banc 1921), the court said:

> A wanton act is a wrongful act done on purpose, or in malicious disregard of the rights of others. Recklessness is an indifference to the rights of others and an indifference whether wrong or injury is done or not. As we understand the words "conscious disregard of the life and bodily safety," they add nothing to the words "willful, wanton and reckless," and are included within the meaning of those words. As applied to an act, they necessarily mean that such act was intentionally done without regard to the rights of others, and in full realization of the probable results thereof.

E. See also *Stojkovic v. Weller*, 802 S.W.2d 152 (Mo.banc 1991), regarding the submissibility of punitive damages in a case involving an intoxicated driver.

F. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Research References

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1. Actual damages

Although ordinary negligence is inconsistent with "willful, wanton or malicious" conduct (MAI 10.01), it is not inconsistent with "complete indifference to or conscious disregard for the safety of others" (MAI 10.02). Hence, plaintiff may submit both actual damages, by MAI 4.01, and punitive damages, by MAI 10.02, but not by MAI 10.01. *Sharp v. Robberson*, 495 S.W.2d 394 (Mo.banc 1973).

2. Res ipsa loquitur

Error to submit instruction on punitive damages where plaintiff's general negligence claim was based upon res ipsa loquitur, which did not require jury to find any specific negligent conduct. *Johnson v. Nat'l Super Mkts., Inc.*, 710 S.W.2d 455 (Mo.App. E.D. 1986).

3. Burden of proof

Punitive damages issue submitted by MAI 3.01 conjointly with MAI 10.02, which requires only a simple belief by the jury that the defendant acted with complete indifference to or conscious disregard for the safety of the plaintiffs rather than requiring beyond a reasonable doubt, was proper and did not deprive defendant of equal protection of the laws. *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 219–20, 224–25 (Mo.App. W.D. 1988).

4. Evidentiary support

Evidence of driver's intoxication, leaving scene of accident, and erratic driving would have supported submission of issue of punitive damages to jury in automobile accident case arising when driver's car collided with that of another motorist after running red light. *Stojkovic v. Weller*, 802 S.W.2d 152 (Mo.banc 1991).

Evidence of prior similar occurrence two days before was insufficient to show that store owner knew, or had reason to know, that its conduct was substantially likely to cause physical harm, as required to support award of punitive damages to child injured when display furniture fell on him; furthermore, store owner had policy for addressing safety problems posed by display furniture, and it was clear that defendant attempted to follow that policy, performing periodic inspections, ordering displays be secured both as general rule and specifically in response to incidents. *Litchfield By and Through Litchfield v. May Dep't Stores Co.*, 845 S.W.2d 596 (Mo.App. E.D. 1992).

Evidence was insufficient to support punitive damages award against gas company that converted truck so that it could be operated on propane gas in negligence action arising out of explosion that occurred when hose connected to propane tank on truck became entangled in overhead brush inside car wash; reasonable juror could not properly find that conduct of company in failing to install solid steel plug in tank was outrageous and posed immediate threat to safety of others. *May v. AOG Holding Corp.*, 810 S.W.2d 655 (Mo.App. S.D. 1991).

5. Punitive damages

Punitive damage instruction submitted by plaintiff in negligence action was properly rejected, as it failed to include necessary element of defendant's knowledge. *Alack v. Vic Tanny Int'l of Mo., Inc.*, 923 S.W.2d 330 (Mo.banc 1996).

10.03 [1983 Revision] Multiple Defendants

When submitting against more than one defendant for punitive damages, use an appropriate instruction from Chapter 10 as a separate paragraph for each such defendant. Use the following sentence as the concluding paragraph of the punitive damage instruction:

If punitive damages are assessed against more than one defendant, the amounts assessed against such defendants may be the same or they may be different.

Research References

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Annotations

1. In general

In false imprisonment suit by doctor against hospital and security guards, instruction offered by doctor regarding punitive damages was not erroneous where instruction was patterned after model jury instructions and only variation was substitution of "a defendant" or "any defendant" in place of "defendant" because suit involved multiple defendants. *Desai v. SSM Health Care*, 865 S.W.2d 833 (Mo.App. E.D. 1993).

In false imprisonment suit against hospital and security guards, doctor was entitled to punitive damages instruction where doctor testified that one guard called doctor a derogatory name and that guards pushed doctor's head against trunk of car, and guards detained doctor because he accused one guard of assault, not because guards believed doctor had trespassed. *Desai v. SSM Health Care*, 865 S.W.2d 833 (Mo.App. E.D. 1993).

Modifying MAI 10.01 by substituting "defendants" for "defendant" is not proper instruction for submission of punitive damages against multiple defendants since it does not include provisions of MAI 10.03, the appropriate punitive damage charge for multiple defendants, whereby defendants are accorded their right to have their conduct considered separately and the amounts assessed as punitive damages, if any, may be different or the same. *Saunders v. Flippo*, 639 S.W.2d 411 (Mo.App. E.D. 1982).

Damages for "outrageous conduct." *Golston v. Lincoln Cemetery, Inc.*, 573 S.W.2d 700 (Mo.App. 1978).

Error to substitute "conduct of the defendants" for "conduct of one or more of the defendants." *Annbar Assocs. v. Am. Express Co.*, 565 S.W.2d 701 (Mo.App. 1978).

10.04 [2008 Revision] Strict Liability—Either Product Defect or Failure to Warn Submitted

If you find in favor of plaintiff under Instruction Number ________ *(here insert number of plaintiff's strict liability verdict directing instruction)* and if you believe:

First, at the time defendant sold the *(describe product)*, defendant knew of the [defective condition and danger][1] [danger][2] submitted in Instruction Number ________ *(here insert number of plaintiff's strict liability verdict directing instruction)*, and

Second, defendant thereby showed complete indifference to or conscious disregard for the safety of others,

then in addition to any damages to which you may find plaintiff entitled under Instruction Number ________ *(here insert number of plaintiff's damage instruction)* you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.][3]

Notes on Use (2008 Revision)

1. When plaintiff's only strict liability submission is based on MAI 25.04, use this bracketed phrase.

2. When plaintiff's only strict liability submission is MAI 25.05, use this bracketed term.

3. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public and, so, was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

This is the appropriate instruction in a case where exemplary damages are submissible in connection with a claim for actual damages based on strict liability under either MAI 25.04 or MAI 25.05, as opposed to negligence or intentional tort. If plaintiff submits under both MAI 25.04 and MAI 25.05, use MAI 10.05. If plaintiff submits on both negligence and strict liability, use MAI 10.06.

Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo.banc 1990), the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

The "clear and convincing" standard of proof for punitive damages adopted by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo.banc 1996), has been incorporated into the burden of proof instruction, MAI 3.01.

Committee Comment (2012 Revision)

A. It was held in *Racer v. Utterman*, 629 S.W.2d 387 (Mo.App. E.D. 1981), that MAI 10.02 is inappropriate for submission of punitive damages in a case wherein compensatory damages are awarded against a strict liability defendant but that:

> If plaintiff, in addition to proving the conduct necessary to support the strict liability claim, can also establish a degree of fault in such conduct sufficient to justify punitive damages, those damages may also be recovered. *Id.* at 396.

B. MAI 10.04 is drafted to submit the issue of punitive damages under the evidence detailed in the *Racer* opinion. If the substantive law and evidence support a submission on a theory other than actual knowledge of the product defect, then there should be an appropriate modification of paragraph First.

C. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Research References

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Annotations

In general 1
Knowledge 2

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1. In general

The difference between MAI 10.02 and MAI 10.04 is the additional element of knowledge required in the latter. The reason for including knowledge directly in the punitive damage instruction for strict liability is that knowledge is not submitted as an element to establish liability. *Hoover's Dairy, Inc. v. Mid-Am. Dairymen, Inc./Special Prods., Inc.*, 700 S.W.2d 426, 436 (Mo.banc 1985).

Products liability plaintiff whose hand was severed by allegedly defective power miter saw was not entitled to award of punitive damages where there was no indication of complete indifference or conscious disregard for safety of others on part of saw's manufacturer. *Bilderback v. Skil Corp.*, 856 S.W.2d 73 (Mo.App. E.D. 1993).

2. Knowledge

Actual knowledge on part of manufacturer is required to submit punitive damages issue to jury in products liability action; punitive damages claim may not be submitted in products liability action on theory of constructive knowledge of product defect. *Angotti v. Celotex Corp.*, 812 S.W.2d 742 (Mo.App. W.D. 1991).

Punitive damages issue was not submissible to jury in products liability action brought against successor to manufacturer of asbestos products by retired insulator who was suffering from asbestosis where evidence merely showed that information regarding harmful effect of asbestos was still developing and did not show that manufacturer's finished products were actually known to present health hazard to insulators. *Angotti v. Celotex Corp.*, 812 S.W.2d 742 (Mo.App. W.D. 1991).

10.05 [2008 Revision] Strict Liability—Both Product Defect and Failure to Warn Submitted

First, if you find in favor of plaintiff under Instruction Number ________ *(here insert number of plaintiff's verdict directing instruction MAI 25.04)* and if you believe that at the time defendant sold the *(describe product)* defendant knew of the defective condition and danger submitted in Instruction Number ________ *(here insert number of plaintiff's verdict directing instruction MAI 25.04)*, or

if you find in favor of plaintiff under Instruction Number ________ *(here insert number of plaintiff's verdict directing instruction MAI 25.05)* and if you believe that at the time defendant sold the *(describe product)* defendant knew of the danger submitted in Instruction Number ________ *(here insert number of plaintiff's verdict directing instruction MAI 25.05)*, and

Second, if you believe that defendant, in one or more of the respects submitted in paragraph First, thereby showed complete indifference to or conscious disregard for the safety of others,

then in addition to any damages to which you may find plaintiff entitled under Instruction Number ________ *(here insert number of plaintiff's damage instruction)* you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.][1]

Notes on Use (2008 Revision)

1. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public and, so, was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

This is the appropriate instruction where exemplary damages are submissible in connection with a claim for actual damages based on both MAI 25.04 and MAI 25.05 and the evidence would permit an award of punitive damages under either theory.

Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo.banc 1990), the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

The "clear and convincing" standard of proof for punitive damages adopted by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo.banc 1996), has been incorporated into the burden of proof instruction, MAI 3.01.

Committee Comment (2012 Revision)

A. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Research References

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10.06 [2008 Revision] Both Negligence and Strict Liability Submitted

If you find in favor of plaintiff under Instruction Number ______ *(here insert number of plaintiff's verdict directing instruction based on negligence)*, and if you believe the conduct of defendant as submitted in Instruction Number ______ *(here insert number of plaintiff's verdict directing instruction based on negligence)* showed complete indifference to or conscious disregard for the safety of others, or

If you find in favor of plaintiff under Instruction Number ______ *(here insert number of plaintiff's strict liability verdict directing instruction)* and if you believe:

First, at the time defendant sold the *(describe product)*, defendant knew of the [defective condition and danger][1] [danger][2] submitted in Instruction Number ______ *(here insert number of plaintiff's strict liability verdict directing instruction)*, and

Second, defendant thereby showed complete indifference to or conscious disregard for the safety of others,

then in addition to any damages to which you may find plaintiff entitled under Instruction Number ______ *(here insert number of plaintiff's damage instruction)* you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.][3]

Notes on Use (2008 Revision)

1. When plaintiff's only strict liability submission is MAI 25.04, use this bracketed phrase.

2. When plaintiff's only strict liability submission is MAI 25.05, use this bracketed term.

3. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public and, so, was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

This is the appropriate instruction in a case where exemplary damages are submissible in connection with a claim for actual damages based on both negligence and strict liability under either MAI 25.04 or MAI 25.05 and the evidence would permit an award of punitive damages under either theory. If plaintiff submits a claim for actual damages based on some other combination of theories that supports the submission of punitive damages, this instruction should be modified to combine the appropriate instructions for Chapter 10 in the manner of MAI 10.06.

Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo.banc 1990), the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

The "clear and convincing" standard of proof for punitive damages adopted by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo.banc 1996), has been incorporated into the burden of proof instruction, MAI 3.01.

See the **Caution** in the Notes on Use to MAI 10.02 for further discussion of potential problems in the submission of punitive damages based on negligence addressed in *Menaugh*. See also MAI 10.07.

Committee Comment (2012 Revision)

A. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Research References

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10.07 [2008 Revision] Modification of MAI 10.02—Submission of Specific Acts and Knowledge

If you find in favor of plaintiff under Instruction Number ________ *(here insert number of plaintiff's verdict directing instruction based on negligence)*, and if you believe that:

First, *(here describe the act or omission which justifies the submission of punitive damages)*, and

Second, defendant knew or had information from which defendant, in the exercise of ordinary care,[1] should have known that such conduct created a high degree of probability of injury, and

Third, defendant thereby showed complete indifference to or conscious disregard for the safety of others,

then in addition to any damages to which you find plaintiff entitled under Instruction Number ________ *(here insert number of plaintiff's damage instruction)* you may award plaintiff an additional amount as punitive damages in such sum as you believe will serve to punish defendant and to deter defendant and others from like conduct.

[You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.][2]

Notes on Use (2008 Revision)

1. The phrase "ordinary care" must be defined. See Chapter 11.

2. Add this bracketed paragraph to comply with the requirements of the United States Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S.Ct. 1057, 166 L.Ed.2d 940 (2007). *Williams* also discusses the concept that the conduct that harmed plaintiff also posed a substantial risk of harm to the general public and, so, was particularly reprehensible. In such a case, this bracketed paragraph may be appropriately modified.

This instruction is MAI 10.02 modified to resolve the problems addressed in *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo.banc 1990). See the **Caution** in the Notes on Use to MAI 10.02 for further discussion.

The use of the phrase "had information from which defendant, in the exercise of ordinary care, should have known" is the equivalent of the phrase "had reason to know" as defined in Restatement (First) and (Second) of Torts, § 12, and as used in *Stojkovic v. Weller*, 802 S.W.2d 152 (Mo.banc 1991), and *Hoover's Dairy, Inc. v. Mid-America Dairymen, Inc. / Special Products, Inc.*, 700 S.W.2d 426 (Mo.banc 1985). The Committee has opted to use this equivalent phrase rather than "had reason to know" because it is thought that the phrase "had reason to know" may be confusing or misleading to the jury.

Under *Menaugh*, the defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16.

Where punitive damages are submitted in a case involving only pecuniary harm, without bodily injury, this instruction may be modified by substituting the phrase "rights of others" for the phrase "safety of others." *Haynam v. Laclede Elec. Co-op., Inc.*, 889 S.W.2d 148 (Mo.App. S.D. 1994).

The "clear and convincing" standard of proof for punitive damages adopted by *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104 (Mo.banc 1996), has been incorporated into the burden of proof instruction, MAI 3.01.

Committee Comment (2012 Revision)

A. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo. The amendments in H.B. 393 (Laws 2005) to § 510.265, RSMo, impose limitations on punitive damages in certain cases. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Research References

West's Key Number Digest
Damages ⚷215(1)

Annotations

1. In general

Survivors of individuals killed in helicopter crash that followed collision with unmarked power line did not show knowing violation of duty or conscious disregard of safety by electrical cooperative and, thus, did not support submission of aggravating circumstances instruction; cooperative obtained advice of counsel that no regulation or statute required any markings, cooperative had knowledge of only one accident and one near accident over 20 years prior, prior accident involved negligence by pilot, which had been complete defense at time, there was no evidence that either accident or prior accident involved violation of statute or regulation designed to prevent injury that occurred, and questionnaire aimed at establishing violation of industry standard was neither clear nor specific enough to support claim for punitive damages. *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151 (Mo.banc 2000).

There must be clear and convincing evidence in support of claim for damages for aggravating circumstances in negligence case. *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151 (Mo.banc 2000).

For negligence plaintiff to recover aggravating circumstances damages, evidence must show that defendant either knew or had reason to know that there was high degree of probability that defendant's conduct would result in injury. *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151 (Mo.banc 2000).

Defendant's conduct must be tantamount to intentional wrongdoing, where natural and probable consequence of conduct is injury, in order for negligence plaintiff to recover for aggravating circumstances based upon defendant's complete indifference to or conscious disregard for safety of others. *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151 (Mo.banc 2000).

Weighing against submission of punitive or aggravating circumstances damages instruction in negligence cases are circumstances in which prior similar occurrences known to defendant have been infrequent, injurious event was unlikely to have occurred absent negligence on part of someone other than defendant, and defendant did not knowingly violate statute, regulation, or clear industry standard designed to prevent type of injury that occurred. *Lopez v. Three Rivers Elec. Coop., Inc.*, 26 S.W.3d 151 (Mo.banc 2000).

10.08 [1992 New] Penalty and Attorney's Fees—Vexatious Refusal to Pay by Insurance Company

If you find in favor of plaintiff on the claim on the insurance policy, and if you believe that defendant insurance company [refused to pay][1] [failed or refused to pay for a period of thirty days after demand][2] without reasonable cause or excuse, then, in addition to any amount you may award on the insurance policy under Instruction No. ________, you may award plaintiff an additional amount as a penalty not to exceed [twenty percent of the first $1,500.00 of the award on the policy not including interest and ten percent of the remainder of such award][3] and you may award plaintiff a reasonable sum for attorney's fees.

Notes on Use (1992 New)

1. This bracketed phrase applies to actions under § 375.420, RSMo.

2. This bracketed phrase applies to actions under § 375.296, RSMo.

1. and 2. Select appropriate bracketed phrase.

3. This bracketed phrase applies to actions under § 375.296 and § 375.420, RSMo. If there is no dispute as to the amount due, if any, under the policy, a calculation may be made of the maximum amount of the penalty and inserted in lieu of the formula.

Committee Comment (1992 New)

A. See the verdict form at MAI 36.10.

Research References

West's Key Number Digest
Damages ⚷215(1)

11.00

DEFINITIONS—NEGLIGENCE

11.01 Highest Degree of Care
11.02 Negligence of Adult
11.03 Negligence and Highest Degree of Care Combined
11.04 Negligence of Minor
11.05 Ordinary Care
11.06 Negligence—Health Care Providers
11.07 Negligence and Ordinary Care Combined
11.08 Negligence—Different Standards of Care
11.09 Ordinary Care—Fraudulent Misrepresentation [Withdrawn 1996]
11.10 Negligence—Ordinary Care— Manufacturers of Certain Products

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Research References

West's Key Number Digest
Negligence 🔑1720

A.L.R. Library
A.L.R. Index, Instructions to Jury; Negligence; Ordinary Care
West's A.L.R. Digest, Negligence 🔑1720

Legal Encyclopedias
C.J.S., Negligence §§ 1007, 1014

11.01 [1996 Revision] Highest Degree of Care

The phrase "highest degree of care" as used in this [these] instruction[s] means that degree of care that a very careful person would use under the same or similar circumstances.

Notes on Use (1978 Revision)

When the phrase "highest degree of care" is used, it must be defined.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Research References

West's Key Number Digest
Negligence ⚷1720

Annotations

1. In general

Where term "negligence" is used, it must be defined; failure to do so creates a roving commission. *Brewer v. Swift & Co.*, 451 S.W.2d 131 (Mo.banc 1970).

Giving both MAI's 11.01 and 11.03 criticized as repetitive, but not prejudicial. *Knowles v. Goswick*, 476 S.W.2d 563 (Mo. 1972).

Jury instruction term "highest degree of care" appropriately defined degree of care driver was mandated to exercise during operation of his motor vehicle. *Hansen v. James*, 847 S.W.2d 476 (Mo.App. W.D. 1992).

Plaintiff could not be charged with a standard of "highest degree of care" in operation of a motor vehicle on a bridge that was under construction and not yet open to the public. *McTeer v. Clarkson Constr. Co., Inc.*, 807 S.W.2d 174 (Mo.App. S.D. 1991).

Where defendant's duty was to use ordinary care, it was error for plaintiff to define highest degree of care. *Schneider v. Bi-State Dev. Agency*, 447 S.W.2d 788 (Mo.App. 1969). But see *Fowler v. Park Corp.*, 673 S.W.2d 749 (Mo.banc 1984).

Where a definable term is used in two or more instructions, the term may be defined in a separate definition instruction, as per Notes on Use. *Epps v. Ragsdale*, 429 S.W.2d 798 (Mo.App. E.D. 1968).

11.02 [1996 Revision] Negligence of Adult

I

The term "negligent" or "negligence" as used in this [these] instruction[s] means the failure to use that degree of care that an ordinarily careful person would use under the same or similar circumstances.

II

The term "negligent" or "negligence" as used in this [these] instruction[s] means the failure to use that degree of care that a very careful person would use under the same or similar circumstances.

Notes on Use (1996 Revision)

Definition No. I is appropriate where only ordinary care is required. Definition No. II is appropriate where the law requires the highest degree of care.

When the term "negligent" or "negligence" is used, it must be defined.

Where either or both terms are used in only one instruction, this definition may be added to the instruction using the term. If they are used in more than one instruction, the definition should be given as a separate instruction.

Caution: The same definition may not properly apply to all the negligence submitted. For example if a driver is sued by a passenger and the driver asserts comparative negligence of the passenger, Definition No. I would apply to the passenger's negligence and Definition No. II would apply to the driver's negligence. See MAI 11.08 for one method of instructing on two standards of care in the same case.

Research References

West's Key Number Digest
Negligence ⚷1720

Legal Encyclopedias
C.J.S., Negligence § 1007

Annotations

In general 1
Presumption of prejudice 3

Separating definition 2

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1. In general

Trial court's error in instructing the jury that negligence means care that a "very careful and prudent person" would use, instead of properly instructing jury that negligence is care that an "ordinary careful and prudent person" would use, had no substantial prejudicial effect on jury. *Fowler v. Park Corp.*, 673 S.W.2d 749 (Mo.banc 1984).

Where term "negligence" is used it must be defined; failure to do so creates a roving commission. *Brewer v. Swift & Co.*, 451 S.W.2d 131 (Mo.banc 1970).

Driver's not-in-MAI submission of passenger's contributory negligence in failing to request driver to reduce speed properly defined passenger's negligence as failure to use ordinary care. *Underwood v. Crosby*, 447 S.W.2d 566 (Mo.banc 1969).

Where plaintiff failed to define the term "negligently" used in his humanitarian verdict-director, and defendant did not request the definition, held not necessarily reversible error. *Carter v. Consol. Cabs*, 490 S.W.2d 39 (Mo. 1973).

Where verdict director hypothesizes "negligence," it is error to define "ordinary care." *Zipp v. Gasen's Drug Stores, Inc.*, 449 S.W.2d 612 (Mo. 1970).

Adding an MAI 19.01 joint tortfeasor clause to an MAI 22.02 to 22.05 type verdict director without definition of negligence "would raise a serious question" since the former uses the word "negligence," and the latter is based on failure to use "ordinary care." *Chambers v. City of Kansas City*, 446 S.W.2d 833 (Mo. 1969).

Where a verdict director uses the term "negligence," a definition of that term is mandatory. *Helfrick v. Taylor*, 440 S.W.2d 940 (Mo. 1969).

Missouri law does not recognize degrees of negligence, but defines negligence in terms of breach of duty owed by a defendant, and recognizes a breach of duty of ordinary care and of the highest degree of care. *Syn, Inc. v. Beebe*, 200 S.W.3d 122 (Mo.App. W.D. 2006).

Negligence is usually defined as the failure to exercise ordinary care, though in a relatively few situations a duty to use the highest standard of care, or that degree of care that a very careful person would use, is imposed. *Syn, Inc. v. Beebe*, 200 S.W.3d 122 (Mo.App. W.D. 2006).

Electrician and heating and cooling contractor hired by mobile home owner to either repair furnace pilot light as owner contended, or troubleshoot a gas leak as propane gas supplier contended, only had a duty to exercise ordinary care rather than exercise the highest degree of care, for purposes of action supplier brought against owner seeking contribution or indemnity on settlement supplier paid in wrongful death action resulting from explosion at mobile home that killed tenant; gas companies were only held to the ordinary care standard, and someone maintaining a gas appliance could not be held to a higher standard than that imposed on the gas company itself. *Syn, Inc. v. Beebe*, 200 S.W.3d 122 (Mo.App. W.D. 2006).

MAI 11.02, subd. II—defining negligence as failure to use "degree of care that a very careful person would use under the same or similar circumstances," but not including phrase "highest degree of care" set forth in MAI 11.03 that incorporates statutory duty of care for operation of motor vehicles—nevertheless properly conveyed requisite degree of care applicable to personal injury case involving automobiles; both instructions ultimately define requisite degree of care in terms of that exercised by very careful person under same or similar circumstances. *Williams v. Jacobs*, 972 S.W.2d 334 (Mo.App. W.D. 1998).

The phrase "highest degree of care" need not and should not be defined twice, but the terms "negligence" and "highest degree of care" are not synonymous and must be separately defined. *Kindle v. Keene*, 676 S.W.2d 82 (Mo.App. S.D. 1984).

Failure to define "ordinary care" used in contributory negligence instruction was not necessarily erroneous. *Robinett v. Kansas City Power & Light Co.*, 484 S.W.2d 506 (Mo.App. 1972).

Defining the term "negligence" used in a res ipsa verdict director was mandatory. *Cunningham v. Hayes*, 463 S.W.2d 555 (Mo.App. 1971).

Inclusion of additional words that do not alter the meaning of the definition of "negligence," held not prejudicial error. *Newsom v. Crockett*, 453 S.W.2d 674 (Mo.App. 1970).

Where defendant's duty was to use ordinary care, it was error for plaintiff to define highest degree of care. *Schneider v. Bi-State Dev. Agency*, 447 S.W.2d 788 (Mo.App. 1969).

Where verdict director submitted defendant's "negligence," it was error to give MAI

11.05 defining "ordinary care" instead of MAI 11.02(I) defining "negligence." *Epps v. Ragsdale*, 429 S.W.2d 798 (Mo.App. E.D. 1968).

2. Separating definition

Giving MAI 11.05 separately from verdict director was not error. *Friend v. Gem Int'l, Inc.*, 476 S.W.2d 134 (Mo.App. 1971).

Where a definable term is used in two or more instructions, the term may be defined in a separate definition instruction, as per Notes on Use. *Epps v. Ragsdale*, 429 S.W.2d 798 (Mo.App. E.D. 1968).

3. Presumption of prejudice

Unless an error instructing a jury on a higher standard of care than the law requires is properly preserved in the trial court, the appellate court cannot review for error nor apply a presumption of prejudice if the incorrect duty of care is applied. *Syn, Inc. v. Beebe*, 200 S.W.3d 122 (Mo.App. W.D. 2006).

11.03 [1996 Revision] Negligence and Highest Degree of Care Combined

The term "negligent" or "negligence" as used in this [these] instruction[s] means the failure to use the highest degree of care. The phrase "highest degree of care" means that degree of care that a very careful person would use under the same or similar circumstances.

Notes on Use (1978 New)

When the term "negligent" or "negligence" is used, it must be defined. When the phrase "highest degree of care" is used, it must be defined.

Where these terms are used in only one instruction, this definition may be added to the instruction using the term. If they are used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (1978 New)

A. This instruction may be used instead of MAI 11.01, and MAI 11. 02II, in a proper case. For example, it may be used to define the term "negligent" or "negligence" only or it may be used to define these terms as well as the phrase "highest degree of care."

Research References

West's Key Number Digest
Negligence ⚷1720

Annotations

In general 1

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1. In general

Water park owner and operator owed 12-year-old patron an ordinary duty of care, rather than the highest degree of care, in connection with raft ride upon which patron was injured.). *Chavez v. Cedar Fair, LP*, 450 S.W.3d 291 (Mo.banc 2014), abrogating Gromowsky v. Ingersol, 241 S.W.2d 60 (Mo.App. 1951).

Giving both MAI 11.01 and 11.03 criticized as repetitive, but not prejudicial. *Knowles v. Goswick*, 476 S.W.2d 563 (Mo. 1972).

In a negligence action brought by motel guest against motel after being bitten by a brown recluse spider, ordinary care was the appropriate definition of negligence, rather than a duty to exercise the highest degree of care. *Wilson v. KAL Motel, Inc.*, 524 S.W.3d 572 (Mo.App. W.D. 2017).

The phrase "highest degree of care" need not and should not be defined twice, but the terms "negligence" and "highest degree of care" are not synonymous and must be separately defined. *Kindle v. Keene*, 676 S.W.2d 82 (Mo.App. S.D. 1984).

An instruction imposing upon a defendant a standard of care greater than that required by law is prejudicially erroneous. *Lee v. Terminal R.R. Ass'n*, 669 S.W.2d 564 (Mo.App. E.D. 1984). But see *Fowler v. Park Corp.*, 673 S.W.2d 749 (Mo.banc 1984).

11.04 [1996 Revision] Negligence of Minor

The term "negligent" or "negligence" as used in this [these] instruction[s] with respect to *(here describe minor such as plaintiff or decedent)* means the failure to use that degree of care which an ordinarily careful [boy] [girl] of the same age, capacity and experience would use under the same or similar circumstances.

Notes on Use (1996 Revision)

This instruction should be given when a minor's negligence is in issue.

When the term "negligent" or "negligence" is used, it must be defined.

Where either or both terms are used with reference to a minor in only one instruction, this definition may be added to the instruction using the term. If they are used in more than one instruction with reference to a minor, the definition should be given as a separate instruction.

See MAI 11.08 for one method of instructing on two standards of care in the same case.

Committee Comment (1996 Revision)

A. In *Anderson v. Woodward Implement Co.*, 256 S.W.2d 819, 824 (Mo. 1953), the court approved an instruction which said in part: "Negligence, within the meaning of this instruction, means the failure to exercise that degree of care which would be exercised by an ordinarily prudent boy of plaintiff's age, capacity and experience under the same or similar circumstances."

In *Lester v. Sayles*, 850 S.W.2d 858 (Mo.banc 1993), the court held:

> The fault of a child should be determined by the fact-finder in each case, based upon that degree of care exercised by children of the same or similar age, judgment, and experience. Only if the child is so young or the evidence of incapacity so overwhelming that reasonable minds could not differ on the issue, should trial courts rule as a matter of law, usually pursuant to a motion for directed verdict, that the child cannot be capable of fault.

B. Caution: This definition is not applicable to minors who are operating motor vehicles. *Wilson v. Shumate*, 296 S.W.2d 72, 77 (Mo. 1956).

Research References

West's Key Number Digest
Negligence ⚷1720

Legal Encyclopedias
C.J.S., Negligence § 1014

11.05 [1996 Revision] Ordinary Care

The phrase "ordinary care" as used in this [these] instruction[s] means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Notes on Use (1996 Revision)

When the phrase "ordinary care" is used, it must be defined.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

This definition of "ordinary care" should not be used in fraudulent misrepresentation cases. In such cases, see MAI 11.09.

Research References

West's Key Number Digest
Negligence ⚷1720

Annotations

In general 1
Modification 2
Separating definition 3

1. In general

Water park owner and operator owed 12-year-old patron an ordinary duty of care, rather than the highest degree of care, in connection with raft ride upon which patron was injured.). *Chavez v. Cedar Fair, LP*, 450 S.W.3d 291 (Mo.banc 2014), abrogating Gromowsky v. Ingersol, 241 S.W.2d 60 (Mo.App. 1951).

Even though jury was instructed as to ordinary care regarding conduct of helicopter pilot and passenger prior to accident, and survivors did not focus on highest degree of care standard in argument, electrical cooperative was prejudiced by jury instructions that confined cooperative to argument that very careful person in exercising highest degree of care would not have placed warnings on power lines into which victims of helicopter crash flew and, thus, erroneously indicated that highest degree of care standard applied to cooperative's decision not to place warnings on power lines; proper instruction would have informed jury that ordinary care standard required cooperative to exercise degree of care ordinarily careful person would use under same or similar circumstances. *Lopez v. Three Rivers Elec. Co-op., Inc.*, 26 S.W.3d 151 (Mo.banc 2000).

Where verdict director hypothesizes "negligence," it is error to define "ordinary care." *Zipp v. Gasen's Drug Stores, Inc.*, 449 S.W.2d 612 (Mo. 1970).

Adding an MAI 19.01 joint tortfeasor clause to an MAI 22.02 to 22.05 type verdict director without definition of negligence "would raise a serious question" since the former uses the word "negligence" and the latter is based on failure to use "ordinary care." *Chambers v. City of Kansas City*, 446 S.W.2d 833 (Mo. 1969).

In a negligence action brought by motel guest against motel after being bitten by a brown recluse spider, ordinary care was the appropriate definition of negligence, rather than a duty to exercise the highest degree of care. *Wilson v. KAL Motel, Inc.*, 524 S.W.3d 572 (Mo.App. W.D. 2017).

Failure to define "ordinary care" used in contributory negligence instruction was not necessarily erroneous. *Robinett v. Kansas City Power & Light Co.*, 484 S.W.2d 506 (Mo.App. 1972).

Where verdict director submitted defendant's "negligence," it was error to give MAI 11.05 defining "ordinary care" instead of MAI 11.02(I) defining "negligence." *Epps v. Ragsdale*, 429 S.W.2d 798 (Mo.App. E.D. 1968).

2. Modification

Defendants in wrongful death case involving fall of workman through unprotected skylight on roof of building were not entitled to instruction that standard of care applicable to workman was that exercised by ordinary careful and prudent experienced workman under like or similar circumstances; appropriate standard was that of "ordinarily careful and prudent person." *Pyle v. Prairie Farms Dairy, Inc.*, 777 S.W.2d 286, 294 (Mo.App. S.D. 1989).

MAI 11.05 is not applicable to a fraud case and "ordinary care" may be defined as ". . . that degree of care that would be reasonable in view of Plaintiff's situation." *Throckmorton v. MFA Cent. Coop.*, 462 S.W.2d 138 (Mo.App. 1970).

3. Separating definition

Giving MAI 11.05 separately from verdict director was not error. *Friend v. Gem Int'l, Inc.*, 476 S.W.2d 134 (Mo.App. 1971).

11.06 [1990 Revision] Negligence—Health Care Providers

The term "negligent" or "negligence" as used in this [these] instruction[s] means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by the members of defendant's profession.

Notes on Use (1990 Revision)

This instruction should be used when a health care provider's negligence is in issue.

When the term "negligent" or "negligence" is used, it must be defined.

Where either or both terms are used in only one instruction, this definition may be added to the instruction using the term. If they are used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (2007 Revision)

A. This instruction conforms to the court's holding in *Gridley v. Johnson*, 476 S.W.2d 475 (Mo. 1972), where the court approved of the deletion from the former instruction of the words "in good standing" and did away with the locality rule in medical malpractice cases.

B. This instruction has been used to define "negligence" of certain other professions. See *Annen v. Trump*, 913 S.W.2d 16 (Mo.App. W.D. 1995) (engineer's design); *Davidson v. Otis Elevator Co.*, 811 S.W.2d 802 (Mo.App. E.D. 1991) (elevator inspection and repair); and *Yantzi v. Norton*, 927 S.W.2d 427 (Mo.App. W.D. 1996) (foundation inspection). MAI 11.06 may be modified for other professions if appropriate.

Research References

West's Key Number Digest
Negligence ⚷1720

Annotations

In general 1
Amendment of instruction 2
Hospitals 3
Modification 4

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1. In general

The phrase "in good standing" should be omitted, and the phrase "practicing in similar localities" criticized. *Gridley v. Johnson*, 476 S.W.2d 475 (Mo. 1972).

In the absence of expert establishing the "standard of care" in MAI 11.06 terms or anything close, patient could not recover for medical negligence based on physician performing an allegedly unnecessary traction/counter-traction reduction to patient's shoulder; expert stated that he was not familiar with the standard of care in the locality or the standard of care for physicians straight out of their residency, and the issues raised in patient's case did not fall under the realm of matters within a juror's common knowledge. *McLaughlin v. Griffith*, 220 S.W.3d 319 (Mo.App. S.D. 2007).

Jury in medical malpractice action brought by patient who had undergone hysterectomy after being told that she had tumor in uterus that she did not in fact have was properly instructed that term negligent or negligence meant failure to use that degree of skill and learning ordinarily used under same or similar circumstances by members of physician's profession; evidence was sufficient to establish physician-patient relationship, and give rise to duty of care stated in instruction. *Smith v. Kovac*, 927 S.W.2d 493 (Mo.App. E.D. 1996).

Verdict directors in medical malpractice action arising out of arthroscopy in which patient's radial nerve was partially severed did not permit jury to infer negligence from fact of injury; if jury had believed defendants' evidence, challenged instructions permitted finding that regardless of fact that nerve was partially severed, defendants were not negligent. *Spain v. Brown*, 811 S.W.2d 417 (Mo.App. E.D. 1991).

2. Amendment of instruction

Modifying MAI 11.06 to read, "by the members of defendant's employees profession," does not constitute error since there is no specific MAI for hospital corporations. *Eichelberger v. Barnes Hosp.*, 655 S.W.2d 699 (Mo.App. E.D. 1983).

3. Hospitals

Where allegations of negligence against hospital were that it failed to observe or medicate psychiatric patients or provide locks or limit stops on windows in a psychiatric ward, MAI 11.07 was not applicable because a hospital clearly has specialized knowledge with respect to the care and treatment of psychiatric patients. MAI 11.06 also was not precisely applicable because the parents' cause of action for wrongful death was not, strictly speaking, medical malpractice. Under these circumstances, it was necessary to modify MAI 11.06 to accurately submit parents' case. *Honey v. Barnes Hosp.*, 708 S.W.2d 686 (Mo.App. E.D. 1986).

4. Modification

Where decedent's comparative negligence injected more than one standard of care into the case, MAI 11.06 was properly modified by MAI 11.08. Additionally, the phrase "health care provider" was unambiguous and needed no further definition. The modified instruction began, "The term 'negligent' or 'negligence' as applied to a health care provider . . ." *Schiles v. Schaefer*, 710 S.W.2d 254 (Mo.App. E.D. 1986).

11.07 [1996 Revision] Negligence and Ordinary Care Combined

The term "negligent" or "negligence" as used in this [these] instruction[s] means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Notes on Use (1978 New)

When the term "negligent" or "negligence" is used, it must be defined. When the phrase "ordinary care" is used, it must be defined.

Where these terms are used in only one instruction, this definition may be added to the instruction using the term. If they are used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (1978 New)

A. This instruction may be used instead of MAI 11.05, and MAI 11.02, in a proper case. For example, it may be used to define the term "negligent" or "negligence" only or it may be used to define these terms as well as the phrase "ordinary care."

Research References

West's Key Number Digest
Negligence ⚿1720

Annotations

1. In general

Water park owner and operator owed 12-year-old patron an ordinary duty of care, rather than the highest degree of care, in connection with raft ride upon which patron was injured.). *Chavez v. Cedar Fair, LP*, 450 S.W.3d 291 (Mo.banc 2014), abrogating Gromowsky v. Ingersol, 241 S.W.2d 60 (Mo.App. 1951).

In a negligence action brought by motel guest against motel after being bitten by a brown recluse spider, ordinary care was the appropriate definition of negligence, rather than a duty to exercise the highest degree of care. *Wilson v. KAL Motel, Inc.*, 524 S.W.3d 572 (Mo.App. W.D. 2017).

Where plaintiff's verdict-directing instruction used "ordinary care," converse instruction used "negligent" and "negligence," and instructions gave identical definitions for all three terms, jury could not have been confused or misled and there was no error in submitting those instructions. *Brown v. Nat'l Super Mkts., Inc.*, 731 S.W.2d 291 (Mo.App. E.D. 1987).

Where allegations of negligence against hospital were that it failed to observe or medicate psychiatric patients or provide locks or limit stops on windows in a psychiatric ward, MAI 11.07 was not applicable because a hospital clearly has specialized knowledge with respect to the care and treatment of psychiatric patients. MAI 11.06 also was not precisely applicable because the parents' cause of action for wrongful death was not, strictly speaking, medical malpractice. Under these circumstances, it was necessary to modify MAI 11.06 to accurately submit parents' case. *Honey v. Barnes Hosp.*, 708 S.W.2d 686 (Mo.App. E.D. 1986).

Submitting MAI 11.07 when an instruction on res ipsa loquitur was appropriate was not prejudicial error. The standard of care and definition of negligence used in MAI 11.07 is in harmony with cases and statutory law applicable to a warehouseman bailee. *Royster v. Pittman*, 691 S.W.2d 305 (Mo.App. W.D. 1985).

2. Deviation

The addition of the phrase "in dealing with such a dangerous commodity" to the ordinary care instruction regarding gas company's duty of care constituted prejudicial error; the inclusion of that phrase suggested a standard of care higher than that required by law. *Abbott v. Mo. Gas Energy*, 375 S.W.3d 104 (Mo.App. W.D. 2012).

11.08 [1996 Revision] Negligence—Different Standards of Care

The term "negligent" or "negligence" as applied to the driver of a motor vehicle means the failure to use that degree of care that a very careful person would use under the same or similar circumstances. The term "negligent" or "negligence" as applied to a [passenger in a motor vehicle] [pedestrian][1] means the failure to use that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Notes on Use (1978 New)

1. Select the appropriate term or phrase.

In a case which involves two different standards of care such as when the plaintiff is a pedestrian or a passenger in a motor vehicle and the defendant is the driver of a motor vehicle, this instruction may be used to define the terms "negligent" and "negligence" as they apply to the respective parties.

Research References

West's Key Number Digest
Negligence ⚷1720

Legal Encyclopedias
C.J.S., Negligence § 1007

Annotations

1. In general

In automobile accident litigation, jury instruction defining negligence in terms of highest degree of care as "failure to use that degree of care that a very careful and prudent person would use under the same or similar circumstances," which instruction was in accordance with MAI 11.08, was proper. *Hagedorn v. Adams*, 854 S.W.2d 470 (Mo.App. W.D. 1993).

Trial court could conclude that erroneous instruction stating that driver was required to be very careful and prudent person prejudiced driver and warranted new trial in action arising out of driver's collision with bridge floor approximately seven and one-half inches above bed of road under construction; driver was not required to exercise highest degree of care and to act as very careful and prudent person where there was no evidence of public's premature use of new highway, where driver had not previously used the highway, and where highway had never been opened. *McTeer v. Clarkson Constr. Co., Inc.*, 807 S.W.2d 174 (Mo.App. S.D. 1991).

Where decedent's comparative negligence injected more than one standard of care in the case, MAI 11.06 was properly modified by MAI 11.08. *Schiles v. Schaefer*, 710 S.W.2d 254 (Mo.App. E.D. 1986).

11.09 [1996 Withdrawn] Ordinary Care—Fraudulent Misrepresentation

Historical Note

(This instruction, its Notes on Use and Committee Comment are withdrawn. Since this definition of "ordinary care" was used only in MAI 23.05, its meaning has been incorporated directly in that verdict directing instruction).

11.10 [1996 Revision] Negligence—Ordinary Care—Manufacturers of Certain Products

I

The term "negligent" or "negligence" as used in this [these] instruction[s] means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by an expert in defendant's business.

II

The phrase "ordinary care" as used in this [these] instruction[s] means that degree of care, skill and learning that an ordinarily careful expert in defendant's business would use under the same or similar circumstances.

Notes on Use (1988 New)

Where the term "negligent" or "negligence" is used, it must be defined.

Where the phrase "ordinary care" is used, it must be defined.

Select the appropriate definition according to the term or phrase used in the instruction. Where the appropriately selected term or phrase is used in only one instruction, the appropriate definition may be added to the instruction using the term or phrase. If used in more than one instruction, the definition should be given as a separate instruction.

Caution: The above definition may not properly apply to all the negligence submitted. See MAI 11.08 for one method of instruction on two standards of care in the same case.

Committee Comment (1988 New)

A. Manufacturers of certain products are held to the standard of care of an expert in that defendant's field. See *Krug v. Sterling Drug, Inc.*, 416 S.W.2d 143 (Mo. 1967) (prescription drug); *Braun v. Roux Distrib. Co., Inc.*, 312 S.W.2d 758 (Mo. 1958) (hair dye); and *La Plant v. E.I. Du Pont De Nemours & Co., Inc.*, 346 S.W.2d 231 (Mo.App. 1961) (weed killer). Where such a standard is applicable, select one of the above definitions, whichever is appropriate.

B. Some other manufacturers have a duty of ordinary care. See *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343 (Mo. 1964).

Research References

West's Key Number Digest
Negligence ⚷1720

Annotations

1. In general

MAI 11.10 is used in cases involving drug manufacturers or in cases involving "the sophisticated nature of the engineering, dynamics, and production" of items such as helicopter engines; it is inapplicable to worker's negligence action against provider of truck undecking facility arising out of injury to worker when a truck rolled backwards during undecking process. *Key v. Diamond Int'l Trucks*, 453 S.W.3d 352 (Mo.App. W.D. 2015).

12.00

UNINSURED AND UNDERINSURED MOTOR VEHICLE

12.00 General Comment—Uninsured and Underinsured Motor Vehicles
12.01 Definitions—Uninsured Motor Vehicle
12.02 Definition—Uninsured Motor Vehicle—Hit-and-Run Vehicle
12.03 Verdict Directing—Uninsured Motor Vehicle—Insurer Only Defendant
12.04 Verdict Directing—Uninsured Motor Vehicle—Insurer and Uninsured Driver Joined
12.05 Verdict Directing—Uninsured Motor Vehicle—Hit-and-Run Vehicle
12.06 Damages—Uninsured Motor Vehicle—Suit Against Insurer Only
12.07 Form of Verdict—Uninsured Motor Vehicle—Both Individual Tort-Feasor and Insurance Carrier Sued
12.08 Form of Verdict—Uninsured Motor Vehicle—Insurer Only Defendant

Research References

West's Key Number Digest
Insurance 🔑2811

A.L.R. Library
A.L.R. Index, Uninsured Motorists
West's A.L.R. Digest, Insurance 🔑2811

12.00 [2012 Revision] General Comment—Uninsured and Underinsured Motor Vehicles

A.1. ***UNINSURED MOTOR VEHICLES***—Uninsured motorist insurance cases combine tort liability and contract liability into one action. The obligation of the uninsured motorist to respond in money damages is governed by tort rules and that of the insurer is governed by contract (treaty and law). Under § 379.203, RSMo, and current policy provisions, recovery can be made in uninsured motor vehicle cases only when the damages result from "bodily injury, sickness or disease, including death."

2. It is the function of the jury to assess the plaintiff's damages and the tort-feasor is liable for the total amount. Use MAI 4.01 or other applicable damage instruction. When the insurance company is found liable, the amount of the judgment against it is a matter of law to be determined by the court. In most instances, it will be set by the policy limits unless the verdict and judgment against the tortfeasor is less than the policy limits.

3. Where the suit is against the insurance company only in an uninsured motor vehicle situation, the measure of damages instruction MAI 12.06 should be used. This instruction does not assess damages against the defendant, but sets the amount of damages sustained by the plaintiff as a result of the collision. If the amount of damages is over the applicable policy limits, the court will enter judgment in the amount of the applicable policy limit. If the damages sustained by plaintiff are less than the policy limit, the court will then enter judgment in that amount.

4. Verdict form MAI 12.08 should be used where the insurance company is sued as the only defendant in uninsured motor vehicle situations.

5. The jury will assess by its general verdict the amount of damages. The court, as a matter of law, will enter judgment against the tort-feasor for the full amount.

6. The court will enter judgment upon the jury's verdict against the uninsured motor vehicle insurance carrier only in such amount as its liability appears as a matter of law, including questions of stacking.

B.1. *UNDERINSURED MOTOR VEHICLES*—Underinsured motor vehicle cases may be submitted by using appropriate uninsured motor vehicle instructions found in this chapter, modified by changing the words "uninsured motor vehicle" to "underinsured motor vehicle" wherever they appear. The phrase "underinsured motor vehicle" would then need a definition, similar in form to MAI 12.01. However, the actual definition of "underinsured motor vehicle" in any case will be derived from the actual policy as construed by the court in light of any ambiguity in the policy. Such definitions may vary significantly from policy to policy. Hence, no pattern instruction for the definition of "underinsured motor vehicle" is provided.

2. In an "underinsured motor vehicle" case, the verdict directing instruction would be patterned after MAI 12.03; and the damage instruction would follow MAI 12.06. If issues exist as to whether the policy was in effect at the time of the collision, or that plaintiff was an "insured" for purpose of "underinsured motor vehicle coverage," appropriate modification of the verdict directing instruction will be needed requiring a jury finding on disputed "ultimate facts" relating to such issues.

3. In many "underinsured motor vehicle" cases, there may be no disputed issues on matters such as the insured status of the plaintiff, effective dates of the policy, the status of the underlying tortfeasor as an "underinsured motorist," etc. In such cases it will be sufficient to submit to the jury the issues of the liability of the original tortfeasor and the amount of plaintiff's damages. MAI 12.01 or 12.02 (modified to identify the claim as one against the insurer on the policy) would then be sufficient to submit liability and MAI 12.06 used to submit the damages issues. The court would then enter judgment in accordance with the insurance contract as a matter of law, determining issues of "stacking," applicable policy limits in excess of the amount paid by the original tortfeasor, and similar issues.

4. If comparative fault is available under the terms of the policy, the facts, and the law, additional appropriate modifications will be required in accordance with Chapter 37.

5. This discussion of proper jury instructions in an "underinsured motor vehicle" case does not relate to issues of admissibility in evidence of matters such as the underlying tortfeasor's policy limits, the amount of the policy limits of the "underinsured motor vehicle" coverage, or other policy provisions. Proper jury instruction is a procedural matter whereas evidentiary matters are just that — matters for the correct application of the rules of evidence.

Historical Note

(MAI 12.00A.1–6 replaces the prior MAI 31.10 from the 6th Edition. MAI 12.00B.1–5 are new in this Edition).

Research References

West's Key Number Digest
Insurance ⚷2811

12.01 [1988 Revision] Definitions—Uninsured Motor Vehicle

I

The phrase “uninsured motor vehicle” as used in this [these] instruction[s] means a motor vehicle which has no bodily injury liability insurance applicable at the time of the collision.

II

The phrase “uninsured motor vehicle” as used in this [these] instruction[s] means a motor vehicle with respect to which the company writing insurance on said vehicle has denied coverage.

III

The phrase “uninsured motor vehicle” as used in this [these] instruction[s] means a motor vehicle with respect to which there was a bodily injury liability insurance policy applicable at the time of the collision but the company writing said policy became insolvent [within two years after the collision].[1]

IV

The phrase “uninsured motor vehicle” as used in this [these] instruction[s] means a motor vehicle with respect to which the identity of the owner or operator cannot be established because the motor vehicle departed the scene of the occurrence with or without physical contact between such vehicle and the plaintiff or the plaintiff’s vehicle.

Notes on Use (1988 Revision)

1. Revise if policy contains more favorable terms. See § 379.203.3, RSMo.

When the phrase “uninsured motor vehicle” is used, it must be defined. Select the appropriate definition.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Research References

West's Key Number Digest
Insurance ⚷2811

Annotations

1. In general

A motorist who carried an automobile liability insurance policy in an amount less than the statutory minimum under § 379.203, RSMo, was held to be an "uninsured" motorist and his vehicle an "uninsured motor vehicle" for purposes of the statute. *Cook v. Pedigo*, 714 S.W.2d 949 (Mo.App. E.D. 1986). See also *Ragsdale v. Armstrong*, 916 S.W.2d 783 (Mo.banc 1996).

12.02 [1978 New] Definition—Uninsured Motor Vehicle—Hit-and-Run Vehicle

The phrase "hit-and-run vehicle" as used in this [these] instruction[s] refers to a motor vehicle which causes bodily injury arising from physical contact with *(select appropriate term, i.e. "plaintiff" or "the vehicle occupied by plaintiff")* where the identity of neither the operator nor owner of such vehicle can be determined.

Notes on Use (1978 New)

This instruction is mandatory when MAI 12.05 is submitted.

Where the phrase is used in only one instruction, this paragraph may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Research References

West's Key Number Digest
Insurance ⚷2811

12.03 [2012 Revision] Verdict Directing—Uninsured Motor Vehicle—Insurer Only Defendant

Your verdict must be for plaintiff if you believe:

First, *(name of operator of uninsured motor vehicle)* was the operator of an uninsured motor vehicle,[1] and

Second, *(name of operator)* violated the traffic signal,[2] and

Third, *(name of operator)* was thereby negligent,[3] and

Fourth, as a direct result of such negligence[3] plaintiff sustained damage. [and][4]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1988 Revision)

1. The phrase "uninsured motor vehicle" must be defined. See definitions of this phrase in MAI 12.01.

2. Select appropriate specification[s] of negligence from Chapter 17. 00. For submitting multiple negligent acts, use the form used in MAI 17.02.

3. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

4. In those cases where the existence of the policy is in issue, the following paragraph must be added:

"Fifth, a policy providing uninsured motorist coverage for plaintiff existed at the time of the occurrence."

Section 379.203, RSMo, requires uninsured motor vehicle coverage whether or not there was physical contact between the uninsured motor vehicle and the insured or the insured's vehicle. That statute also requires coverage although the identity of the owner or operator of such vehicle cannot be identified because the vehicle left the scene of the occurrence. In such situations, the definition of "uninsured motor vehicle" in MAI 12.01 IV must be used along with MAI 12.03, modified to read as follows:

Your verdict must be for plaintiff if you believe:

First, the operator of an uninsured motor vehicle[1] violated the traffic signal,[2] and

Second, the operator of said vehicle was thereby negligent,[3] and

Third, as a direct result of such negligence[3] plaintiff sustained damage.

* Add if affirmative defense is submitted. Do not use to submit comparative fault of the plaintiff.

Historical Note

(MAI 12.03 replaces the prior MAI 31.11 from the 6th Edition).

Research References

West's Key Number Digest
Insurance ⚷2811

Annotations

1. In general

MAI 31.11 does not make the presence or absence of "accident" an issue in uninsured motorist cases; jury is not required to find that injuries are the result of an "accident." *Thornburg v. Farmers Ins. Co.*, 859 S.W.2d 847 (Mo.App. W.D. 1993).

12.04 [2012 Revision] Verdict Directing—Uninsured Motor Vehicle—Insurer and Uninsured Driver Joined

If you find the issues for plaintiff under Instruction Number ________ *(here insert number of verdict directing instruction against the uninsured driver)*, your verdict must be for plaintiff and against defendant *(insert name of insurance company)* if you believe *(insert name)* was the operator of an uninsured motor vehicle.[1]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*[2]].

Notes on Use (1978 New)

1. The phrase "uninsured motor vehicle" must be defined. See definitions of this phrase in MAI 12.01.

2. The legal right to recovery against the uninsured motor vehicle operator will have been decided. Only affirmative policy defenses should be inserted, for example, MAI 32.24.

This instruction submits against insurer when the uninsured operator is joined; the submission against the uninsured operator must be made by a 17.00 series or other applicable instruction.

* Add if affirmative defense is submitted. Do not use this bracketed phrase to submit comparative fault of the plaintiff.

Historical Note

(MAI 12.04 replaces the prior MAI 31.12 from the 6th Edition).

Research References

West's Key Number Digest
Insurance ⚷2811

12.05 [2012 Revision] Verdict Directing—Uninsured Motor Vehicle—Hit-and-Run Vehicle

Your verdict must be for plaintiff if you believe:

First, *(select appropriate term, i.e., plaintiff or the vehicle occupied by plaintiff)* was struck by a hit-and-run vehicle,[1] and

Second, the operator of the hit-and-run vehicle violated the traffic signal,[2] and

Third, the operator of the hit-and-run vehicle was thereby negligent,[3] and

Fourth, as a direct result of such negligence,[3] plaintiff sustained damage. [and][4]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction).*]

Notes on Use (1988 Revision)

This instruction may be given in lieu of MAI 12.03 if the policy has specific language relating to "hit-and-run" vehicle.

1. The phrase "hit-and-run vehicle" must be defined. See definition of this phrase in MAI 12.02.

2. Select the appropriate specification[s] of negligence from Chapter 17.00. For submitting multiple negligent acts, use the form shown in MAI 17.02.

3. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

4. In those cases where the existence of the policy is in issue, the following phrase must be added:

"Fifth, a policy providing uninsured motorist coverage for plaintiff existed at the time of the occurrence."

* Add if affirmative defense is submitted. Do not use to submit comparative fault of the plaintiff.

Historical Note

(MAI 12.05 replaces the prior MAI 31.13 from the 6th Edition).

Research References

West's Key Number Digest
Insurance ⚷2811

12.06 [2012 Revision] Damages—Uninsured Motor Vehicle—Suit Against Insurer Only

If you find in favor of plaintiff, then you must find plaintiff's damages in such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][1] as a direct result of the collision[2] mentioned in the evidence.

Notes on Use (2002 Revision)

1. This may be added if supported by the evidence.

2. In a non-hit-and-run case, in which there is no collision, an appropriate term such as "occurrence" must be substituted for the term "collision."

In a case such as *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo.banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the collision mentioned in the evidence" from this instruction and substitute the phrase "that *(describe the compensable event or conduct)* directly caused or directly contributed to cause."

Other modifications also may be appropriate. For further discussion, see MAI 4.01.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

This instruction should be used only where a suit on uninsured motor vehicle coverage names the insurer as the single defendant and the operator of the uninsured motor vehicle is not joined. This instruction should be used only where form of verdict MAI 36.14 is used.

This instruction requires the jury to define the amount of the plaintiff's damages but does not determine the amount of the judgment against the insurer. That amount is determined as a matter of law by the court.

If the law and the insurance policy permit the application of comparative fault in such a case, modify this instruction in accordance with the format of MAI 37.03.

Historical Note

(MAI 12.06 replaces the prior MAI 4.11 from the 6th Edition).

Research References

West's Key Number Digest
Insurance ⚷2811

Annotations

1. In general

The omission of the qualifying terms "fairly and justly" did not change the essential sense of MAI 4.11 and, therefore, this omission did not require a reversal. *Stuart v. State Farm Mut. Auto. Ins. Co.*, 699 S.W.2d 450, 457 (Mo.App. W.D. 1985).

12.07 [2012 Revision] Form of Verdict—Uninsured Motor Vehicle—Both Individual Tort-Feasor and Insurance Carrier Sued

VERDICT ________[1]

Note: Complete this form by writing in the names required by your verdict.

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name of individual defendant)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

Note: Complete the following paragraphs only if the above finding is in favor of plaintiff *(state the name)*.

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* at $________ *(stating the amount)*.

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name of insurer)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________________ ______________________________

______________________________ ______________________________

______________________________ ______________________________

______________________________ ______________________________

______________________________ ______________________________

______________________________ ______________________________

Notes on Use (1980 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging."

The jury verdict does not determine the amount of the judgment against the uninsured motorist insurance carrier. If the jury verdict is against both the uninsured motor vehicle operator and the insurance company, the court should enter a judgment against the operator in the amount of the jury verdict against him and enter a judgment against the insurance company in an amount in accordance with the policy limits and the verdict.

Verdict forms should not be read by the court to the jury.

Committee Comment (1980 New)

A. The amount of the judgment against the uninsured motor vehicle operator defendant is determined by the jury verdict. The amount of the judgment against the defendant insurance company is a question of contract law to be decided by the court.

Historical Note

(This verdict form replaces the prior MAI 36.13 from the 6th Edition).

Research References

West's Key Number Digest
Insurance ⚷2811

12.08 [2012 Revision] Form of Verdict—Uninsured Motor Vehicle—Insurer Only Defendant

VERDICT ________[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name)*, we, the undersigned jurors find in favor of:

____

(Plaintiff *(state the name))* or (Defendant *(state the name))*

Note: Complete the following paragraph only if the above finding is in favor of plaintiff *(state the name)*.

We, the undersigned jurors, find plaintiff was damaged in the sum of $________ *(stating the amount)*.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________

Notes on Use (1980 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging."

This verdict form should be used only in uninsured motor vehicle cases where the insurance company is the only defendant and where MAI 4.11 is used.

Verdict forms should not be read by the court to the jury.

Historical Note

(This verdict form replaces the prior MAI 36.14 from the 6th Edition).

Research References

West's Key Number Digest
Insurance ⚷2811

13.00

DEFINITIONS—AGENCY

13.01 General Comment
13.02 Battery Committed by Servant
13.03 Scope of Employment—Dual Purpose Acts
13.04 Scope of Employment—Route Deviation
13.05 Scope of Employment
13.06 Scope of Agency—Servant or Independent Contractor
13.07(1) Contract—Apparent Authority—Conduct of Principal
13.07(2) Contract—Apparent Authority—Acts of Agent With Principal's Knowledge

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Research References

West's Key Number Digest
Principal and Agent ⚷194(1), 194(2)

A.L.R. Library
A.L.R. Index, Agency; Apparent Authority; Instructions to Jury
West's A.L.R. Digest, Principal and Agent ⚷194(1), 194(2)

Legal Encyclopedias
C.J.S., Agency §§ 193, 602

13.01 [2011 Revision] General Comment

A. As the pattern instructions submit only ultimate issues, a question of respondeat superior liability might be submitted simply "The driver Jones was operating the *(defendant's)* motor vehicle within the scope and course of his agency for *(defendant)*." But these words alone are not apt to mean much to lay jurors, so some clarification is needed. The definitions following are intended to supply this clarification.

B. Agency questions arise in a variety of cases. Typical are:

1. Tort actions by third persons against an alleged principal who raises the defense that the tort-feasor was an independent contractor.

2. Tort actions by third persons against master who raises the defense that the servant was not engaged in master's business at time of tort. These include route deviations, dual purpose trips and independent frolics of the servant.

3. Tort actions by third persons against the master for battery by a servant where the master raises the defense that the servant acted beyond the scope of his authority.

C. A universally applicable definition of "scope of agency" is not practicable. For this reason, the Committee has prepared definitions to fit the most common cases. Other definitions may be needed for other problems, but these patterns should serve as a guide in those areas not specifically covered. The purpose of these definitions is to call to the jury's attention the fact issues that determine liability in a particular case.

D. The difference between an agent and a servant is sometimes misunderstood, and this causes confusion when instructing. Missouri courts have consistently defined a "servant" as a person "whose physical conduct in the performance of the service is controlled or subject to the right of control by the master." *Madsen v. Lawrence*, 366 S.W.2d 413, 415 (Mo. 1963). By way of contrast, an independent contractor is a person who contracts with another to do something for him or her, but who is neither controlled by the other nor subject to the other's right to control with respect to the person's physical conduct in the performance of the undertaking. *Id.*

E. In drawing the distinction between a servant and an independent contractor, Missouri courts have frequently cited Restatement (Second) of Agency's definition of a "servant" in § 220. See, e.g., *Scott v. SSM Healthcare St. Louis*, 70 S.W.3d 560, 567 (Mo.App. E.D. 2002). Subsection (1) of § 220 set forth the "control or right to control" test, and subsection (2) listed the ten factors that have historically been considered by courts in distinguishing between servants and independent contractors.

F. Restatement (Third) of Agency § 7.07(3), though not presently adopted in Missouri, substitutes the term "employee" for "servant" and defines an "employee" as "an agent whose principal controls or has the right to control the manner and means of the agent's performance of work." See Comment f to Restatement (Third) of Agency § 7.07 for a discussion of the "definition of employee" and the ten factors previously listed in § 220 of Restatement (Second) of Agency. The Committee takes no position on whether any portion of Restatement (Third) of Agency should be adopted in Missouri.

G. See MAI 13.06 for a discussion of how to submit the issue of whether a master/principal/employer may be held responsible for the tortious acts of an alleged servant/agent/employee.

H. See MAI 37.05(1) and (2) for submission of vicarious liability issues in comparative fault cases.

Research References

West's Key Number Digest
Principal and Agent ⚷194(1)

Legal Encyclopedias
C.J.S., Agency § 602

Annotations

1. In general

Medical center was liable for patient's death caused by fire in room despite jury verdict in favor of medical center's employee where center's liability was not predicated solely upon conduct of employee. Plaintiff also submitted primary negligence of medical center consisting of allowing smoking without approved ashtray, absence of smoke detector, inadequate fire training, etc. *Stacy v. Truman Med. Ctr.*, 836 S.W.2d 911 (Mo.banc 1992).

In action against truck owner for his driver's negligence it was error to give a converse instruction exonerating the owner unless the jury believed the owner was negligent; it should have submitted the driver's lack of negligence. *Denny v. Mathieu*, 452 S.W.2d 114 (Mo.banc 1970).

Where undisputed evidence showed defendant's employee created a dangerous condition plaintiff's verdict director need not hypothesize that element. *Cline v. Carthage Crushed Limestone Co.*, 504 S.W.2d 102 (Mo. 1973).

Although agency is denied by answer, where defendants' evidence showed agency, that issue was properly omitted from plaintiff's verdict director. *Hulahan v. Sheehan*, 522 S.W.2d 134 (Mo.App. 1975).

Where agency of defendant's negotiators was conceded, it was not necessary to define "scope and course of employment." *Kaiser v. Lyon Metal Prods., Inc.*, 461 S.W.2d 893 (Mo.App. 1970).

Where defendant denied its employee was acting within the scope of his employment, plaintiff's verdict director must hypothesize that element and the term must be defined. *Ratterree v. Gen. Motors Corp.*, 460 S.W.2d 309 (Mo.App. 1970).

Not error to omit definition of "scope of employment" where agency was not in issue. *Terry v. Sweeney*, 420 S.W.2d 368 (Mo.App. 1967).

13.02 [1978 Revision] Battery Committed by Servant

Acts were within the "scope and course of employment" as that phrase is used in this [these] instruction[s] even though not specifically authorized by *(name of master)* if:

1. they were done by *(name of servant)* to further the [business] [interests][1] of *(name of master)* under the general authority and direction of *(name of master)*, and

2. they naturally arose from the performance of *(name of servant's)* work.

Notes on Use (1978 Revision)

1. Select the appropriate term.

When the phrase "scope and course of employment" or the phrase "scope and course of agency" is used, it must be defined. See MAI 18.01.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (2011 Revision)

A. For many years, the leading Missouri case on this subject was *Haehl v. Wabash Railroad Co.*, 119 Mo. 325, 24 S.W. 737, 740 (1893). In language that still sets forth the applicable considerations, the court said:

> The principle of respondeat superior applies only when what is complained of was done in the course of the employment. The principal is responsible, not because the servant has acted in his name or under color of his employment, but because the servant was actually engaged in and about his business, and carrying out his purposes. He is then responsible, because the thing complained of, although done through the agency of another, was done by himself; and it matters not in such case whether the injury with which it is sought to charge him is the result of negligence, unskillful or of wrongful conduct, for he must choose fit agents for the transaction of his business. But if his business is done, or is taking care of itself, and his servant, not being engaged in it, not concerned about it, but impelled by motives that are wholly personal to himself, and simply to gratify his own feeling of resentment, whether

> provoked or unprovoked, commits an assault upon another, when that has and can have no tendency to promote any purpose in which the principal is interested, and to promote which the servant was employed, then the wrong is the purely personal wrong of the servant, for which he, and he alone, is responsible.

B. In *Wellman v. Pacer Oil Co.*, 504 S.W.2d 55, 58 (Mo.banc 1973), the court criticized certain language in *Haehl* when it held as a matter of law that the actions of a service station attendant who shot a customer were "so outrageous and criminal—so excessively violent as to be totally without reason or responsibility—and hence must be said, as a matter of law, not to be within the scope of his employment." The court cited Restatement (Second) of Agency § 231, Comment a, to the effect that "the master is not responsible for acts [that] are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result." *Id. Wellman* was followed in *Noah v. Ziehl*, 759 S.W.2d 905 (Mo.App. E.D. 1988), where the court set aside a verdict against a tavern owner when it found that the actions of a doorman were so outrageous as to fall outside the scope of employment as a matter of law.

C. Restatement (Third) of Agency § 7.07(2), although not presently adopted in Missouri, deals with this topic by stating:

> An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.

Comment b to Restatement (Third) of Agency § 7.07 discusses the preference of that Restatement for a test based on the agent's *intention* as opposed to the test of "foreseeability" favored by the Restatement (Second) (and expressly adopted by the court in *Wellman*). The Committee takes no position on whether any portion of Restatement (Third) of Agency should be adopted in Missouri.

D. The Committee further notes that when an employee's tortious conduct is outside the scope of employment, alternate theories of liability may be available against the employer, such as the independent torts of negligent hiring/retention or negligent failure to supervise. See, e.g., *Gibson v. Brewer*, 952 S.W.2d 239, 247 (Mo.banc 1997), citing Restatement (Second) of Torts § 317 (1965); *St. John Bank & Trust Co. v. City of St. John*, 679 S.W.2d 399 (Mo.App. E.D. 1984); and *Gaines v. Monsanto Co.*, 655 S.W.2d 568 (Mo.App. E.D. 1983). See also Restatement (Second) of Agency § 235, Comment c, which provides under "outrageous acts" that the principal is liable if the principal has violated a personal duty to the person injured or due to the nature of the instrumentality entrusted to the servant.

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Annotations

In general 1
Other servants 2

1. In general

Verdict director for false arrest based on agency (MAI 18.01 to 23.04) requires definition of scope of employment. *Peak v. W.T. Grant Co.*, 409 S.W.2d 58 (Mo.banc 1966).

MAI 13.02 is proper to define agency in other kinds of cases, such as fraud by agent. *Tietjens v. Gen. Motors Corp.*, 418 S.W.2d 75 (Mo. 1967).

MAI 13.02 is designed to submit the issue of whether one admittedly employed was acting within the scope of his employment, while MAI 13.06 is designed to submit the issue of whether the wrongdoer is an agent (or employee) or is an independent contractor. *Jefferson Cty. Bank & Trust Co. v. Dennis*, 523 S.W.2d 165 (Mo.App. 1975).

2. Other servants

MAI 13.02 is proper to submit other wrongful or tortious conduct of an agent. *Jefferson Cty. Bank & Trust Co. v. Dennis*, 523 S.W.2d 165 (Mo.App. 1975).

13.03 [1990 Revision] Scope of Employment—Dual Purpose Acts

Acts[1] were within the "scope and course of employment" as that phrase is used in this [these] instruction[s] if:

1. they were done by *(name of servant)* partially to serve the [business] [interests][2] of *(name of master)* and partially to carry out the [business] [interests][2] of *(here insert name of servant or such other party as is appropriate)*, and

2. *(master's)* business created the necessity for the trip, and

3. *(name of master)* either controlled or had the right to control the physical conduct of *(name of servant)*.

Notes on Use (1990 Revision)

1. A phrase describing the general conduct which is the subject of the alleged employment or agency, such as "operation of the motor vehicle," may be substituted for the word "acts." Grammatical changes to the rest of this instruction then may be appropriate.

2. Select the appropriate term.

When the phrase "scope and course of employment" or the phrase "scope and course of agency" is used, it must be defined. See MAI 18.01.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (1965 New)

A. The dual purpose doctrine has arisen most frequently in workmen's compensation cases. In *Gingell v. Walters Contracting Corp.*, 303 S.W.2d 683, 688 (Mo.App. 1957), the court quoted with approval from Judge Cardozo's decision in *Marks' Dependents v. Gray*, 251 N.Y. 90, 167 N.E. 181 (1929), which said:

> We do not say that service to the employer must be the sole cause of the journey, but at least it must be a concurrent cause. To establish liability, the inference must be permissible that

> the trip would have been made though the private errand had been cancelled. * * * The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. * * * If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.

B. The court then concluded that the employer's needs were sufficiently pressing that had the employee not consented to perform them, some other person would have been required to make the trip. *Gingell*, 303 S.W.2d at 689. That being true, the employee was within the scope of his employment. *Id.*

C. See also *Corp v. Joplin Cement Co.*, 337 S.W.2d 252 (Mo.banc 1960), approving the Cardozo decision and the language in *Gingell v. Walters Contracting Corp.*

D. The dual purpose doctrine was applied in a respondeat superior liability case in *Foster v. Campbell*, 355 Mo. 349, 196 S.W.2d 147 (1946). The court said:

> If the trip was for the mixed or double purpose of her business and the business of her husband as well, and there was no material deviation from those purposes, it may not be said that she was not engaged upon her husband's business when she was returning home, after having sold her produce and purchased feed, with the gasoline which she had procured at his request. 42 C.J., § 867, p. 1107; Tutie v. Kennedy, Mo.App., 272 S.W. 117, 123; Cable v. Johnson, Mo.App., 63 S.W.2d 433, 435. 'An act may be within the scope of employment, although done in part to serve the purposes of the servant or of a third person. * * * The fact that the predominant motive of the servant is to benefit himself or a third person does not prevent the act from being within the scope of employment.' 1 Restatement, Agency, Sec. 236 and comment pp. 530, 531.

E. Compare *Stokes v. Four-States Broadcasters, Inc.*, 300 S.W.2d 426 (Mo. 1957).

F. See also *Massey v. Berlo Vending Co.*, 329 S.W.2d 772 (Mo. 1959), where the dual purpose question was said to be a jury issue.

G. See also Restatement (Second) of Agency § 236 (1958).

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13.04 [1990 Revision] Scope of Employment—Route Deviation

Acts[1] were within the "scope and course of employment" as that phrase is used in this [these] instruction[s] if they were done to serve the [business] [interests][2] of *(name of master)* while *(name of servant)* was at a place where work required *(name of servant)* to be.

Notes on Use (1990 Revision)

1. A phrase describing the general conduct which is the subject of the alleged employment or agency, such as "operation of the motor vehicle," may be substituted for the word "acts." Grammatical changes to the remainder of this instruction then may be appropriate.

2. Select the appropriate term.

This definition assumes that there is no controversy about the existence of a master-servant relationship. See MAI 13.06 in case master-servant relationship is disputed.

When the phrase "scope and course of employment" or the phrase "scope and course of agency" is used, it must be defined. See MAI 18.01.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (1965 New)

A. In *Thomas v. McBride Express Co.*, 266 S.W.2d 11, 13 (Mo.App. 1954), the court said:

> An act of a servant is not within the scope of employment if it is done with no intention to perform it as a part of or incident to a service on account of which the servant is employed. . . .. A servant may in certain instances deviate from the most direct or authorized route and still be in the master's service. Thus it may be that one turns aside to avoid heavy traffic, or to seek a smoother route. There may be parallel routes leading in the direction of his ultimate destination, either of which could be said to be within his sphere of service, on the theory that it might be reasonably expected that he would, in the exercise of his best judgment, choose either while in the pursuit of his master's business; or he might turn aside to attend to necessary personal wants which are considered incidental to his

> employment. But any turning aside from the designated or customary route, where the sole motive is self interest, unmixed with any intent to serve the master, separates the servant from the master's service, regardless of the extent of the deviation. Any other rule would lead to inconsistencies and ultimate confusion in the law.

B. In *Cable v. Johnson*, 63 S.W.2d 433, 436 (Mo.App. 1933), the court said:

> [W]here a servant, who takes the automobile of his master in performing some service for this master at a distant point, deviates temporarily from the path of duty by using the master's car for his own purpose, he may be considered as having returned to his master's service when he reaches a point on his return trip where his original mission might reasonably have required him to be . . ..

C. In *Kinkead v. Management & Engineering Corp.*, 103 S.W.2d 545, 547 (Mo.App. 1937), the court said:

> It is the law that where the servant deviates from the scope of his employment for his own purposes, he is still upon his own trip, even though engaged in returning to his employment, until he has returned either to the point of his departure from the path of duty, or to a point where, in the performance of his duty, he is required to be.

D. The Missouri view is somewhat different from that adopted by Restatement (Second) of Agency § 237 (1958) which places the deviating servant within the scope of employment so long as the servant is "reasonably near the authorized space" limit authorized by the master.

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13.05 [1990 Revision] Scope of Employment

Acts[1] were within the "scope and course of employment" as that phrase is used in this [these] instruction[s] if:

1. they were a part of the work *(name of servant)* was employed to perform, and

2. they were done by *(name of servant)* to serve the [business] [interests][2] of *(name of master)*.

Notes on Use (1990 Revision)

1. A phrase describing the general conduct which is the subject of the alleged employment or agency, such as "operation of the motor vehicle," may be substituted for the word "acts." Grammatical changes to the remainder of this instruction then may be appropriate.

2. Select the appropriate term.

This definition may be used where the master-servant relationship is admitted but the master alleges that the servant was not on the master's business. See MAI 13.06 in case where master-servant relationship is disputed.

When the phrase "scope and course of employment" or the phrase "scope and course of agency" is used, it must be defined. See MAI 18.01.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (1965 New)

A. See Restatement (Second) of Agency § 228 (1958).

B. In *Wolf v. Terminal Railroad Association of St. Louis*, 282 Mo. 559, 222 S.W. 114, 114 (1920), the court said: "The fact that the act was done during the time of the servant's employment is not conclusive, nor is the motive of the servant so. The question is, Was the act done by virtue of the employment and in furtherance of the master's business?"

C. See also 10 Mo.L.Rev. 169 (1951).

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Annotations

1. In general

Error for plaintiff to omit MAI 13.05 when verdict director used MAI 18.01 requiring a finding that driver was "within the scope and course of his employment." *Chandler v. New Moon Homes, Inc.*, 418 S.W.2d 130 (Mo.banc 1967).

Where as a matter of law evidence showed employee was acting within the scope of his employment, it was unnecessary to hypothesize that element in his verdict director. *Elliott v. St. Louis Sw. Ry. Co.*, 487 S.W.2d 7 (Mo. 1972).

Jury instruction that attempted to find an agency relationship between two wrecking companies was prejudicial because it failed to require a finding that any representations made by one company were authorized in some fashion by the other company. It also was prejudicial in defining acts within the scope of employment because there was no evidence to show that the subcontractor was an employee of the wrecking company. *Snyder Bros. Co. v. Library Landholders, Inc.*, 718 S.W.2d 633 (Mo.App. S.D. 1986).

In suit on accidental death policy, the term "course of employment" as used in instruction defining "non-occupational injury" was plain and unambiguous and the jury needed no instruction to define it. *Brock v. Firemens Fund of Am. Ins. Co.*, 637 S.W.2d 824 (Mo.App. E.D. 1982).

Where plaintiffs' recovery depends on agency of defendant's employee, that disputed fact must be submitted not only by definition of agency but also by inclusion in plaintiffs' verdict director. *Galemore Motor Co., Inc. v. State Farm Mut. Auto. Ins. Co.*, 513 S.W.2d 161 (Mo.App. 1974).

13.06 [1990 Revision] Scope of Agency—Servant or Independent Contractor

Acts[1] were within the "scope and course of agency" as that phrase is used in this [these] instruction[s] if:

1. they were performed by *(name of alleged servant)* to serve the [business] [interests][2] of *(name of alleged master)* according to an express or implied agreement with *(name of alleged master)*, and

2. *(name of alleged master)* either controlled or had the right to control the physical conduct of *(name of alleged servant)*.

Notes on Use (2011 Revision)

1. A phrase describing the general conduct that is the subject of the alleged employment or agency, such as "operation of the motor vehicle," may be substituted for the word "acts." Grammatical changes to the remainder of this instruction then may be appropriate.

2. Select the appropriate term.

This definition is to be used only when defendant is charged with *respondeat superior* liability and there is a dispute that the alleged tortfeasor was not his servant. See MAI 13.04 and MAI 13.05 where there is no dispute as to the master-servant relationship.

When the phrase "scope and course of employment" or the phrase "scope and course of agency" is used, it must be defined. See MAI 18.01.

Where the phrase is used only in one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

The phrase "scope and course of agency" is to be used where the issue is whether the tort-feasor was a servant rather than an independent contractor. Liability is imposed on the principal even though the principal engages another for only one task. See *Leidy v. Taliaferro*, 260 S.W.2d 504 (Mo. 1953). To use the phrase "scope and course of employment" in such a case might be misleading to lay jurors who probably think of employees as those who receive regular weekly paychecks. The phrase "scope and course of agency" is less apt to mislead and, therefore, is preferable although technically "scope and course of employment" would be more appropriate.

Committee Comment (2011 Revision)

A. In *Bach v. Winfield-Foley Fire Protection District*, 257 S.W.3d 605, 608 (Mo.banc 2008), the court said: "Agency is the fiduciary relationship resulting from the manifestation of consent by an agent to a principal that the agent will act on the principal's behalf and subject to his control." Restatement (Second) of Agency § 1. The parties may not have intended to create the legal relationship or to have subjected themselves to the liabilities that the law imposes as a result of it; nevertheless, the relationship exists "if there has been a manifestation by the principal to the agent that the agent may act on his account, and consent by the agent so to act." See *Leidy v. Taliaferro*, 260 S.W.2d 504, 505 (Mo. 1953).

B. As noted by the court in *Leidy*, "compensation to the agent is not essential to the creation or existence of the relationship." *Id.* at 507.

C. For a thorough review of Missouri law on the requirements for agency in Missouri, see *State ex rel. Ford Motor Co. v. Bacon*, 63 S.W.3d 641 (Mo.banc 2002). Compare also Restatement (Second) of Agency § 220.

D. In *Wigger v. Consumers Cooperative Association*, 301 S.W.2d 56, 60 (Mo.App. 1957), the court said:

> The courts have many times held that in determining whether the relationship of master and servant or employer and employee exists, one of the essential or primary elements is the right to control the means and manner of the service as distinguished from controlling the ultimate results of the service. McFarland v. St. Louis Car Co., Mo.App., 262 S.W.2d 344; O'Brien v. Rindskopf, 334 Mo. 1233, 70 S.W.2d 1085; McFarland v. Dixie Machinery & Equipment Co., 348 Mo. 341, 153 S.W.2d 67, 136 A.L.R. 516; Hackler v. Swisher Mower & Machine Co., Mo.App., 284 S.W.2d 55, 58. However, it is equally well established that "every case has been decided on its particular facts, and while the element of control is of the greatest significance in determining the existence of the required relationship, *the fact of control standing alone is not conclusive*."

See also: *Garber v. Scott*, 525 S.W.2d 114 (Mo.App. 1975).

E. By way of contrast, *Williamson v. Southwestern Bell Telephone Co.*, 265 S.W.2d 354 (Mo. 1954), defines an independent contractor as a person who "contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking." This definition is the general rule of and definition of "independent contractor." See also: *Kaplan v. U.S. Bank, N.A.*, 166 S.W.3d 60 (Mo.App. E.D. 2003).

F. As discussed in the Committee Comment to MAI 13.01, Restatement (Third) of Agency § 7.07(3) substitutes the term "employee" for "servant" and defines an "employee" as "an agent whose principal controls or has the right to control the manner and means of the agent's performance of work." See Comment f to Restatement (Third) of Agency § 7.07 for a discussion of the "definition of employee" and the ten factors that have historically been considered in distinguishing between a servant/employee and an independent contractor. The Committee takes no position on whether any portion of Restatement (Third) of Agency should be adopted in Missouri.

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Annotations

In General 1
Employees 2

1. In General

Doctor, who was one of two stockholder employees of professional corporation, who shared responsibility for treatment of kidney patient, and who was out of town when other stockholder employee negligently treated patient, could not give directions and had no right of control over other stockholder employee concerning patient's treatment; therefore, agency instruction given in wrongful death action arising out of patient's death warranted reversal of judgment against doctor and remand for further proceedings. *Goff v. St. Luke's Hosp. of Kansas City*, 753 S.W.2d 557, 561 (Mo.banc 1988).

In defining "scope and course of agency," the instruction should use names rather than "principal" and "agent." *Parker v. Stern Bros. & Co.*, 499 S.W.2d 397 (Mo. 1973).

Automobile case. Plaintiff submitted agency as to driver of trucking company. Defendant attempted to converse the definitional instruction relating to "scope and course of agency" rather than conversing the verdict directing instruction. Held that such a converse was prejudicially erroneous, particularly where the converse of the definitional instruction in MAI 13.06 limited the right to control the conduct of the alleged agent to "the performance of the undertaking of hauling asphalt" rather than the "operation of the truck" as submitted by the verdict director. *Gaynor v. Circle B Trucking, Inc.*, 801 S.W.2d 369 (Mo.App. E.D. 1990).

Where evidence did not show plaintiff's driver was her agent it was error to give a contributory negligence instruction. *McAuliffe v. Vondera*, 494 S.W.2d 692 (Mo.App. 1973).

Defendant contending tort-feasor was not his agent but was "employee" of "independent contractor" must define those terms by MAI 13.06. *Barkley v. Mitchell*, 411 S.W.2d 817 (Mo.App. 1967).

2. Employees

MAI 13.02 is designed to submit the issue of whether one admittedly employed was acting within the scope of his employment, while MAI 13.06 is designed to submit the issue of whether the wrongdoer is an agent (or employee) or is an independent contractor. *Jefferson Cty. Bank & Trust Co. v. Dennis*, 523 S.W.2d 165 (Mo.App. 1975).

13.07(1) [1996 Revision] Contract—Apparent Authority—Conduct of Principal

Acts of *(name of apparent agent)* were within the "scope and course of agency" as that phrase is used in this [these] instruction[s] if:

First, the conduct of *(name of apparent principal)* was such that an ordinarily careful person would believe that *(name of apparent agent)* had authority to perform such acts on behalf of *(name of apparent principal)*, and

Second, *(name of relying person)* reasonably relied on such conduct of *(name of apparent principal)* at the time of the transaction mentioned in the evidence.

Notes on Use (1986 New)

When the phrase "scope and course of employment" or the phrase "scope and course of agency" is used, it must be defined. See MAI 18.01.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (1986 New)

A. This instruction is not based upon an agreement between principal and agent (although they may have an agreement). It is based on an estoppel of the principal to deny the apparent authority of the actor to act for the principal.

B. MAI 13.07(1) defines acts "within the scope and course" of apparent "agency" when the person relying on appearances of authority is led by the conduct of the principal to believe that the actor has actual authority from the principal to act for the principal.

C. MAI 13.07(2) defines acts "within the scope and course" of apparent "agency" when the person relying on apparent authority is led solely by the conduct of the actor (in the circumstances) to believe the actor has actual authority from the principal to act for the principal. Although the relying person may not know of the principal's knowledge of the conduct of the actor at the time of reliance, proof must show both that the principal knew or had reason to know of the actor's misleading conduct and failed to act to prevent reliance on such misleading conduct of the actor.

D. For case law discussions of apparent authority in conventional contractual settings, see *Martin v. First National Bank in St. Louis*, 358 Mo. 1199, 219 S.W.2d 312 (1949); *Koewing v. Greene County Building and Loan Association of Springfield*, 327 Mo. 680, 38 S.W.2d 40 (1931). In *Dierks & Sons Lumber Co. v. Morris*, 404 S.W.2d 229, 232 (Mo.App. 1966), the court set out the requirements:

> In order for one to sanction another as his agent by holding him out as such, two essentials must concur: the purported agent must conduct himself in a manner consistent with some pretense of authority, and knowledge of his conduct in that particular, or some reasonable basis for the suspicion of it, must be brought home to the alleged principal.

See also *Springfield Television, Inc. v. Gary*, 628 S.W.2d 398 (Mo.App. S.D. 1982); *Sturgeon v. State Bank of Fisk*, 616 S.W.2d 578 (Mo.App. S.D. 1981); *Molasky Enters., Inc. v. Carps, Inc.*, 615 S.W.2d 83 (Mo.App. E.D. 1981).

E. For a discussion of apparent authority in a tort setting, see *State ex rel. Massman v. Bland*, 355 Mo. 17, 194 S.W.2d 42 (Mo.banc. 1946).

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Annotations

1. In general

In appropriate cases, MAI 13.07(1) applies to tort cases; evidence supported instruction on apparent agency of person who was in electricity supplier's warehouse and gave transformer fuse to customer who injured himself in attempt to install it. *Mobley v. Webster Elec. Coop.*, 859 S.W.2d 923 (Mo.App. S.D. 1993).

Jury instruction that attempted to find an agency relationship between two wrecking companies was prejudicial because it failed to require a finding that any representations made by one company were authorized in some fashion by the other company. It also was prejudicial in defining acts within the scope of employment because there was no evidence to show that the subcontractor was an employee of the wrecking company. *Snyder Bros. Co. v. Library Landholders, Inc.*, 718 S.W.2d 633 (Mo.App. S.D. 1986).

13.07(2) [1996 Revision] Contract—Apparent Authority—Acts of Agent With Principal's Knowledge

Acts of *(name of apparent agent)* were within the "scope and course of agency" as that phrase is used in this [these] instruction[s] if:

First, the conduct of *(name of apparent agent)* was such that an ordinarily careful person would believe that *(name of apparent agent)* had authority to perform such acts on behalf of *(name of apparent principal)*, and

Second, *(name of apparent principal)* knew or had reason to know of such conduct and allowed such conduct, and

Third, *(name of relying person)* reasonably relied on such conduct of *(name of apparent agent)* at the time of the transaction mentioned in the evidence.

Notes on Use (1986 New)

When the phrase "scope and course of employment" or the phrase "scope and course of agency" is used, it must be defined. See MAI 18.01.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (1986 New)

A. This instruction is not based upon an agreement between principal and agent (although they may have an agreement). It is based on an estoppel of the principal to deny the apparent authority of the actor to act for the principal.

B. MAI 13.07(1) defines acts "within the scope and course" of apparent "agency" when the person relying on appearances of authority is led by the conduct of the principal to believe that the actor has actual authority from the principal to act for the principal.

C. MAI 13.07(2) defines acts "within the scope and course" of apparent "agency" when the person relying on apparent authority is led solely by the conduct of the actor (in the circumstances) to believe the actor has actual authority from the principal to act for the principal. Although the relying person may not know of the principal's knowledge of the conduct of the actor at the time of reliance, the proof must show both that the principal knew or had reason to know of the actor's misleading conduct and failed to act to prevent reliance on such misleading conduct of the actor.

D. For case law discussions of apparent authority in conventional contractual settings, see *Martin v. First National Bank in St. Louis*, 358 Mo. 1199, 219 S.W.2d 312 (1949); *Koewing v. Greene County Building and Loan Association of Springfield*, 327 Mo. 680, 38 S.W.2d 40 (1931). In *Dierks & Sons Lumber Co. v. Morris*, 404 S.W.2d 229, 232 (Mo.App. 1966), the court set out the requirements:

> In order for one to sanction another as his agent by holding him out as such, two essentials must concur: the purported agent must conduct himself in a manner consistent with some pretense of authority, and knowledge of his conduct in that particular, or some reasonable basis for the suspicion of it, must be brought home to the alleged principal.

See also *Springfield Television, Inc. v. Gary*, 628 S.W.2d 398 (Mo.App. S.D. 1982); *Sturgeon v. State Bank of Fisk*, 616 S.W.2d 578 (Mo.App. S.D. 1981); *Molasky Enters., Inc. v. Carps, Inc.*, 615 S.W.2d 83 (Mo.App. E.D. 1981).

E. For a discussion of apparent authority in a tort setting, see *State ex rel. Massman v. Bland*, 355 Mo. 17, 194 S.W.2d 42 (Mo.banc 1946).

Research References

West's Key Number Digest
Principal and Agent ⚷194(2)

Legal Encyclopedias
C.J.S., Agency § 213

Annotations

1. In General

Independent adjustor's acts in adjusting loss were binding on property insurer if adjustor's conduct led insured to believe that adjustor had authority to bind the insurer, insurer knew or had reason to know of this conduct and allowed it, and insured reasonably relied on the conduct; the adjustor had to be acting within scope of apparent authority. *Goralnik v. United Fire and Cas. Co.*, 240 S.W.3d 203 (Mo.App. E.D. 2007).

14.00

DEFINITIONS—YIELD THE RIGHT-OF-WAY

14.01 General Comment
14.02 Vehicle Entering Intersection After Another Vehicle
14.03 Vehicle on the Left
14.04 Vehicle Making Left Turn at Intersection
14.05 Vehicle Entering at Stop Sign or Yield Sign
14.06 Vehicle Entering From an Alley or Driveway
14.07 Making Left Turn Into Alley or Driveway
14.08 Vehicle on the Left Combined With Vehicle Entering Intersection After Another Vehicle
14.09 Special Pedestrian Control Signals

Research References

West's Key Number Digest
Automobiles 🔑246(1), 246(6), 246(9)

A.L.R. Library
A.L.R. Index, Automobiles and Highway Traffic; Pedestrians; Right of Way
West's A.L.R. Digest, Automobiles 🔑246(1), 246(6), 246(9)

Legal Encyclopedias
Am. Jur. 2d, Automobiles § 1091
C.J.S., Motor Vehicles § 1461

14.01 [1978 Revision] General Comment

A. In its report to the Supreme Court, the Committee recommended that instructions submit only "ultimate issues" without evidentiary detail. Failure to yield the right-of-way is such an issue, but submitting this issue without explanation might be inadequate. When such issues as following too closely or failing to signal are submitted, the jurors know what is meant and a further explanation would be superfluous. But jurors are not apt to understand which party has the duty to yield in every situation. In addition to the common law duty to yield the right-of-way, the statutes dictate which party must yield in a variety of situations. For this reason a number of definitions have been prepared which explain to the jury the circumstances under which the duty to yield exists.

B. These definitions are to be used when and only when there is evidence to show that the defined duty to yield existed and the failure to yield caused damage.

C. Failure to yield the statutory right-of-way may be negligence per se if there is no evidence of valid excuse for the violations. *Lay v. McGrane*, 331 S.W.2d 592 (Mo. 1960); *MacArthur v. Gendron*, 312 S.W.2d 146 (Mo.App. 1958).

D. These instructions define the phrase "failure to yield the right-of-way." As such, the instruction which submits "failure to yield the right-of-way" (verdict director or contributory negligence instruction) and the definition instruction, which supplements that instruction, speak of the same party, i.e., the party who is in the less favored position at the intersection. Any negligence of the party asserting the right-of-way should be submitted in the instruction directed to the conduct of that party. This would usually be submitted as failure to keep a careful lookout (MAI 17.05), failure to act after danger of collision apparent (MAI 17.04) or the like. The failure of the favored party to exercise the highest degree of care in asserting the right-of-way does not relieve the less favored party from the duty to yield the right-of-way. In *Haymes v. Swan*, 413 S.W.2d 319, 325 (Mo.App. 1967) the court said:

> Whether or not plaintiff [the favored party] was contributorily negligent in entering the intersection at a time when it appeared or should have appeared to a reasonably prudent person that to do so would probably result in an accident would not obviate the primary duty of defendant to permit plaintiff, first into the intersection, to pass in safety.

Research References

West's Key Number Digest
Automobiles ⚷246(1)

Annotations

In general 1
Affirmative defense 2
Definition mandatory 3
Proximate cause 4

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1. In general

Where evidence differed about which vehicle first reached intersection, both MAI 14.02 and 14.03 were properly used for defining right-of-way at uncontrolled intersection, as declared by Notes on Use. *Kratzer v. King*, 401 S.W.2d 405 (Mo. 1966).

Where plaintiff's verdict director submitted defendant's failure to keep a lookout, it was error to give MAI 14.02 defining right-of-way, an element not applicable to the issues. *Corbin v. Wennerberg*, 459 S.W.2d 505 (Mo.App. 1970).

MAI 14.02 properly modified to define right-of-way according to *Maritime Law. Wiesemann v. Pavlat*, 413 S.W.2d 23 (Mo.App. 1967).

2. Affirmative defense

Pedestrian v. Motorist, contributory negligence instruction need not define "place of safety" or "immediate path." *Frantz v. State Farm Mut. Auto. Ins. Co.*, 526 S.W.2d 345 (Mo.App. 1975).

3. Definition mandatory

Giving verdict-directing instruction on failure to yield right-of-way without an MAI definition was reversible error. *Jensen v. Walker*, 496 S.W.2d 317 (Mo.App. 1973).

4. Proximate cause

Verdict director erroneously submitted that driver failed to yield the right-of-way when entering highway from private roadway when evidence failed to show other car was then so close as to create an immediate hazard. (§ 304.351(5), RSMo). *Cope v. Thompson*, 534 S.W.2d 641 (Mo.App. 1976).

14.02 [1978 Revision] Vehicle Entering Intersection After Another Vehicle

The phrase "yield the right-of-way" as used in this [these] instruction[s] means a driver is required to yield to another vehicle which enters the intersection first.

Notes on Use (1978 Revision)

This definition is intended for use where there is a collision at intersecting highways and there are no traffic controls at the intersection. The definition does not apply where the accident occurs at the intersection of a highway with a private road, alley, or driveway. For such a case, use Yield the Right-of-Way Definition MAI 14.06.

This definition will also be appropriate where city ordinances establish a duty to yield the right-of-way at intersecting streets or to define the common law duty to yield the right-of-way.

Committee Comment (1990 Revision)

A. This definition is based on § 304.351.1, RSMo. This section of the statute specifically covers the duty to yield the right-of-way to a vehicle that has already entered the intersection. The common law establishes a similar duty to yield the right-of-way. See *Wilson v. Toliver*, 365 Mo. 640, 285 S.W.2d 575 (1955).

B. See General Comment at MAI 14.01.

Research References

West's Key Number Digest
Automobiles ⚿246(9)

Annotations

In general 1
Modification 2

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1. In general

MAI 14.02 is for the statutory right-of-way on public roads, not a private parking lot; in that latter case, common law right-of-way is based on duty of reasonable care, not the highest degree of care. *Doolin v. Swain*, 524 S.W.2d 877 (Mo.banc 1975).

Modified MAI 28.01 [Now 32.01] to 14.02 proper as a defensive failure to yield right-of-way instruction against MAI 17.01 (violation of traffic signal) where there was evidence traffic signals were not working. *Jefferson v. Biggar*, 416 S.W.2d 933 (Mo. 1967).

Where evidence differed about which vehicle first reached intersection, both MAI 14.02 and 14.03 were properly used for defining right-of-way at uncontrolled intersection, as declared by Notes on Use. *Kratzer v. King*, 401 S.W.2d 405 (Mo. 1966).

Trial court properly gave MAI 14.02 in action arising out of motor vehicle accident at uncontrolled intersection in which stalled motor vehicle was struck by truck, whether or not the stalled vehicle was planning to make a left turn; truck had absolute duty to yield right-of-way because motor vehicle had already entered intersection, duty was not obviated by truck driver's antecedent negligence in approaching at too high of speed, and neither of streets which formed intersection was a through highway. *Krenski v. Aubuchon*, 841 S.W.2d 721 (Mo.App. E.D. 1992).

Error to give MAI 14.02 in case where plaintiff was struck at intersection controlled by a flashing red light. *Riley v. Bi-State Transit Sys.*, 459 S.W.2d 753 (Mo.App. 1970).

Where plaintiff's verdict director submitted defendant's failure to keep a lookout it was error to give MAI 14.02 defining right-of-way, an element not applicable to the issues. *Corbin v. Wennerberg*, 459 S.W.2d 505 (Mo.App. 1970).

2. Modification

MAI 14.02 properly modified to define right-of-way according to *Maritime Law. Wiesemann v. Pavlat*, 413 S.W.2d 23 (Mo.App. 1967).

14.03 [1978 Revision] Vehicle on the Left

The phrase "yield the right-of-way" as used in this [these] instruction[s] means the driver on the left is required to yield if both vehicles reach the intersection at approximately the same time.

Notes on Use (1978 Revision)

This definition is intended for use where there is a collision at intersecting highways and there are no traffic controls at the intersection. The definition does not apply where the accident occurs at the intersection of a highway with a private road, alley, or driveway. For such a case, use Yield the Right-of-Way Definition MAI 14.06.

This definition will also be appropriate where city ordinances establish the same duty to yield the right-of-way at intersecting streets.

Committee Comment (1990 Revision)

A. The definition is based on § 304.351.2, RSMo. See *Klee v. Bryan*, 346 S.W.2d 695 (Mo.App. 1961), where the right-of-way was established by ordinance. The court instructed that a violation was negligence per se. See also *Knight v. Richey*, 363 Mo. 293, 250 S.W.2d 972 (1952), where plaintiff instructed on defendant's failure to yield to plaintiff's vehicle, which was on the right as required by statute. Plaintiff also instructed on defendant's failure to yield the common law right-of-way to plaintiff who had entered the intersection first.

B. See also General Comment at MAI 14.01.

Research References

West's Key Number Digest
Automobiles ⚷246(9)

Annotations

1. In general

Where evidence differed about which vehicle first reached intersection, both MAI 14.02 and 14.03 were properly used for defining right-of-way at uncontrolled intersection, as declared by Notes on Use. *Kratzer v. King*, 401 S.W.2d 405 (Mo. 1966).

Instruction was inappropriate where defendant collided with rear of plaintiff's vehicle after plaintiff had already completed left turn. *McLeod v. Beloate*, 891 S.W.2d 476 (Mo.App. W.D. 1994).

MAI 14.03 is the proper instruction for collision occurring in a four-way stop intersection. *McCarthy v. Cullom*, 634 S.W.2d 494 (Mo.App. E.D. 1982).

14.04 [1978 Revision] Vehicle Making Left Turn at Intersection

The phrase "yield the right-of-way" as used in this [these] instruction[s] means a driver attempting to make a left turn is required to yield when another vehicle is approaching from the opposite direction and is within the intersection or is so close to the intersection that it is an immediate hazard.

Notes on Use (1978 Revision)

Making a left turn into an alley, private road or driveway is covered by Yield the Right-of-Way definition, MAI 14.07.

Committee Comment (1996 Revision)

A. This definition is based on § 304.351.3, RSMo. This section was the basis of an instruction in *MacArthur v. Gendron*, 312 S.W.2d 146 (Mo.App. 1958). As there was no evidence of any circumstances excusing the violation of the statute, the court held proper an instruction making such violation negligence per se.

B. See also *Anthony v. Jennings*, 368 S.W.2d 533 (Mo.App. 1963).

C. See also General Comment at MAI 14.01.

Research References

West's Key Number Digest
Automobiles ⚷246(9)

Annotations

In general 1
Harmless error 2

1. In general

Error to give defensive right-of-way instruction where that is not an issue in the case. *Will v. Gilliam*, 439 S.W.2d 498 (Mo. 1969).

2. Harmless error

Where collision occurred at a driveway—rather than at a street intersection—the proper right-of-way definition was MAI 14.07 and it was error to give MAI 14.04. The error however, was beneficial to defendant and harmless. *Griggs v. Riley*, 489 S.W.2d 469 (Mo.App. 1972).

14.05 [1978 Revision] Vehicle Entering at Stop Sign or Yield Sign

The phrase "yield the right-of-way" as used in this [these] instruction[s] means a driver is required to yield at the [stop sign] [yield sign][1] if the other vehicle is within the intersection or is so close to the intersection that it is an immediate hazard.

Notes on Use (1978 Revision)

1. Select the appropriate term.

The duty to yield the right-of-way at a stop sign or yield sign is to be distinguished from the duty to yield the right-of-way when entering a highway from an alley, private road, or driveway. The latter is covered by Yield the Right-of-Way definition, MAI 14.06.

Committee Comment (1996 Revision)

A. This definition is based on § 304.351.4, RSMo. The definition does not make reference to a through highway because the present statute establishes the duty to yield the right-of-way at a stop sign or a yield sign. The definition does not include the statutory reference to stopping because the duty is to yield, and a reference to stopping is unnecessary.

B. This definition is also appropriate where ordinances impose the same duty to yield the right-of-way.

C. See also General Comment at MAI 14.01.

Research References

West's Key Number Digest
Automobiles ⚷246(9)

Annotations

1. In general

MAI 14.02 is for the statutory right-of-way on public roads, not a private parking lot; in that latter case, common law right-of-way is based on duty of reasonable care, not the highest degree of care. *Doolin v. Swain*, 524 S.W.2d 877 (Mo.banc 1975).

Right-of-way MAI 14.06, rather than MAI 14.05, should be used to define right-of-way when entering highway from a private road, but evidence must show it was in fact a private road. *McDowell v. Mohn*, 426 S.W.2d 95 (Mo. 1968).

Contributory negligence instruction defining right-of-way by MAI 14.05 was proper where plaintiff drove into through highway, creating an immediate hazard. *Todd v. Presley*, 413 S.W.2d 173 (Mo. 1967).

In negligence action arising from two-vehicle collision, instruction on failure to yield right-of-way at stop sign was supported by evidence that defendant was still stopped at stop sign when other vehicle was only 20 feet from intersection, that other vehicle was traveling with flow of traffic in 35 mile-per-hour zone, and that defendant had unobstructed view of 1,125 feet in direction from which other vehicle approached. *Hudson v. Whiteside*, 34 S.W.3d 420 (Mo.App. W.D. 2000).

14.06 [1978 Revision] Vehicle Entering From an Alley or Driveway

The phrase "yield the right-of-way" as used in this [these] instruction[s] means a driver entering the roadway from an [alley] [private road] [driveway][1] is required to yield to another vehicle approaching on the highway.

Notes on Use (1978 Revision)

1. Select the appropriate term.

Committee Comment (1996 Revision)

A. This definition is based on § 304.351.5, RSMo.

B. Failure to yield the right-of-way was offered in a contributory negligence (now comparative fault) instruction in *Hulse v. Herren*, 357 S.W.2d 154 (Mo. 1962).

C. A city ordinance with similar provisions was held applicable and admissible in *Kenney v. J.A. Folger & Co.*, 192 S.W.2d 73 (Mo.App. 1946).

D. See also General Comment at MAI 14.01.

Research References

West's Key Number Digest
Automobiles ⚷246(9)

Annotations

In general 1
Proximate cause 2

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1. In general

Right-of-way MAI 14.06, rather than MAI 14.05, should be used to define right-of-way when entering highway from a private road, but evidence must show it was in fact a private road. *McDowell v. Mohn*, 426 S.W.2d 95 (Mo. 1968).

2. Proximate cause

Absence of "immediate hazard" language in MAI 14.06 requiring that a driver of a vehicle entering a highway from a private road yield right-of-way to a vehicle on a highway to be entered was clearly intended by the legislature. *Karashin v. Haggard Hauling & Rigging, Inc.*, 653 S.W.2d 203 (Mo.banc 1983); overruling *Cope v. Thompson*, 534 S.W.2d 641 (Mo.App. 1976); and *Taylor v. Schneider*, 370 S.W.2d 725 (Mo.App. 1963).

14.07 [1978 Revision] Making Left Turn Into Alley or Driveway

The phrase "yield the right-of-way" as used in this [these] instruction[s] means a driver attempting to make a left turn into an [alley] [private road] [driveway][1] is required to yield when another vehicle is approaching from the opposite direction and the making of the left turn would create a traffic hazard.

Notes on Use (1978 Revision)

1. Select the appropriate term.

Committee Comment (1996 Revision)

A. This definition is based on § 304.351.6, RSMo.

B. See *Bowman v. Ryan*, 343 S.W.2d 613 (Mo.App. 1961); *Steele v. Goosen*, 329 S.W.2d 703 (Mo. 1959). Compare *Wilkins v. Stuecken*, 359 Mo. 1047, 225 S.W.2d 131 (1949), where such a turn made defendant negligent as a matter of law.

C. See also General Comment at MAI 14.01.

Research References

West's Key Number Digest
Automobiles ⚷246(9)

Annotations

1. Harmless error

Where collision occurred at a driveway—rather than at a street intersection—the proper right-of-way definition was MAI 14.07 and it was error to give MAI 14.04. The error, however, was beneficial to defendant and harmless. *Griggs v. Riley*, 489 S.W.2d 469 (Mo.App. 1972).

14.08 [1978 New] Vehicle on the Left Combined With Vehicle Entering Intersection After Another Vehicle

The phrase "yield the right-of-way" as used in these instructions means that if both vehicles reach the intersection at approximately the same time, the driver on the left is required to yield but if both vehicles do not reach the intersection at approximately the same time, then a driver is required to yield to another vehicle which enters the intersection first.

Notes on Use (1978 New)

This definition is intended for use where both parties claim the other party failed to yield the right-of-way. This instruction covers the situation where the evidence supports the claim of the vehicle on the left that it reached the intersection first and the evidence also supports the claim of the vehicle on the right that both vehicles reached the intersection at approximately the same time. If both parties claim the other party failed to yield the right-of-way under some other combination of definitions contained in Chapter 14.00, the appropriate definitions should be combined in a single definition instruction in a manner similar to this instruction.

Research References

West's Key Number Digest
Automobiles ⚷246(9)

14.09 [1990 New] Special Pedestrian Control Signals

The phrase “yield the right-of-way” as used in this [these] instruction[s] means a driver is required to yield to a pedestrian crossing the roadway facing a special pedestrian control signal exhibiting the word “walk” at the time the pedestrian entered the roadway.

Notes on Use (1990 New)

This definition is intended for use only when there is a collision with a pedestrian where there are pedestrian-control signals.

Committee Comment (1990 New)

A. This definition is based on § 304.291, RSMo.

B. Where an intersection or other location is not controlled by special pedestrian-control signals, other statutes or ordinances governing pedestrian right-of-way may be applicable. For example, see § 304.281, RSMo. An appropriate not-in-MAI instruction may be drafted and used in accordance with another applicable statute or ordinance governing “right-of-way” in other situations.

C. See also General Comment at MAI 14.01.

Research References

West’s Key Number Digest
Automobiles 🔑246(6)

Legal Encyclopedias
C.J.S., Motor Vehicles § 1461

15.00

WILL CONTEST

15.01 Definition—Sound and Disposing Mind and Memory
15.02 Definition—Undue Influence
15.03 Burden of Proof
15.04 Verdict Directing
15.05 Verdict Directing—Partial Invalidity of Will Due to Fraud
15.06 Verdict Directing—Partial Invalidity of Will Due to Undue Influence
15.07 Affirmative Defense—Fraud Invalidating Will
15.08 Affirmative Defense—Undue Influence
15.09 Illustration—Will Contest
15.10(A) Form of Verdict
15.10(B) Form of Verdict—Partial Invalidity

Research References

West's Key Number Digest
Wills 🔑329(3), 330(1), 331(1), 332, 333

A.L.R. Library
A.L.R. Index, Instructions to Jury; Wills
West's A.L.R. Digest, Wills 🔑329(3), 330(1), 331(1), 332, 333

Legal Encyclopedias
Am. Jur. 2d, Wills §§ 814, 897
C.J.S., Wills §§ 21, 764, 766, 771

15.01 [1969 New] Definition—Sound and Disposing Mind and Memory

The phrase "sound and disposing mind and memory" as used in this [these] instruction[s] means that when a person signs a [will] [codicil][1] that person:

First, was able to understand the ordinary affairs of life, and

Second, was able to understand the nature and extent of that person's property, and

Third, was able to know the persons who were the natural objects of that person's bounty, and

Fourth, could intelligently weigh and appreciate that person's natural obligations to those person's.

Notes on Use (1978 New)

1. Select the appropriate term.

When the phrase "sound and disposing mind and memory" is used, it must be defined. See MAI 15.04.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (1969 New)

A. In *Strahl v. Turner*, 310 S.W.2d 833, 838 (Mo. 1958), the court quoted *Hardy v. Barbour*, 304 S.W.2d 21, 34 (Mo. 1957), which stated:

> [T]his court recently restated the time honored general rule as to testamentary capacity in this way: "A testator with mind enough to understand the ordinary affairs of life, the kind and extent of his property, who are the natural objects of his bounty, and that he is giving his property to the persons mentioned in his will, in the manner therein stated, is capable of making a will under the law of this state."

B. In *Sturm v. Routh*, 373 S.W.2d 922, 928 (Mo. 1964), the court said:

> It has long been the rule in this state that "[t]o have a

> mind and memory enough to make a will, testator should be able at the time to understand the ordinary affairs of life, the value and extent of his property, the number and names of the persons who were the natural objects of his bounty, their deserts with reference to their conduct and treatment of him, their capacity and necessities. He should have active memory enough to retain all these facts in his mind, without the aid of others, long enough to have his will made."

Research References

West's Key Number Digest
Wills ⚷330(1)

Legal Encyclopedias
C.J.S., Wills § 764

Annotations

In general 1
Burden of proof 2

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1. In general

In a will contest, it was error to put burden of proof on contestant to show decedent was of unsound mind; that burden rests on proponents throughout the trial. *Brug v. Mfrs. Bank & Trust Co.*, 461 S.W.2d 269 (Mo.banc 1970).

Since the purpose of MAI is to submit fact issues accurately and concisely, a rambling, argumentative pre-MAI-type defense instruction in a will contest was properly refused. *Barnes v. Marshall*, 467 S.W.2d 70 (Mo. 1971).

Use of a pre-MAI definition of "sound and disposing memory" that used the name of the testatrix instead of "a person" in the first paragraph was not prejudicial error. *Arterburn v. Meadows*, 451 S.W.2d 85 (Mo. 1970).

2. Burden of proof

Contestants' wordy instruction on testamentary capacity which failed to submit ultimate issue was properly refused. *Earney v. Clay*, 462 S.W.2d 672 (Mo. 1971).

15.02 [2012 Revision] Definition—Undue Influence

The phrase "undue influence" as used in this [these] instruction[s] means such influence as destroys the free choice of the person making the [will] [codicil][1] [contested part of the will][2].

Notes on Use (2012 Revision)

1. Select the appropriate term.

2. This alternative is for use where only a part of the will is contested under § 473.081, RSMo. See MAI 15.05, 15.06 and verdict form 15.10(B).

When the phrase "undue influence" is used, it must be defined. For example, see MAI 15.06 and 15.08.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Historical Note

(This definition of "undue influence" has been renumbered from MAI 15.03 to its current MAI 15.02. The new MAI 15.03 (burden of proof) has been renumbered from the prior MAI 3.03).

Research References

West's Key Number Digest
Wills ⚷332

Legal Encyclopedias
C.J.S., Wills § 766

Annotations

1. In general

MAI 15.03 (now 15.02) is a will contest instruction and does not mandatorily apply to a case for discovery of assets. *Estate of Gross v. Gross*, 840 S.W.2d 253 (Mo.App. E.D. 1992).

15.03 [2012 Revision] Burden of Proof

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true.

The burden is upon defendant, proponent, to cause you to believe that the document dated ________ is the last will and testament [codicil] of ________ *(name of testator).*

The burden is on the plaintiff, contestant, to cause you to believe *(here insert affirmative defenses raised such as "his claim of undue influence as submitted in Instruction Number ________").*[1]

In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence.

If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Notes on Use (1995 Revision)

1. Omit this paragraph if no affirmative defense is submitted.

A burden of proof instruction must be given in every case. MAI 15.03 is to be used in a will contest. When only part of a will is contested under § 473.081, RSMo, the second paragraph should be omitted and the third paragraph modified as follows: "The burden is upon plaintiff to cause you to believe the claim of *(insert claimed basis of partial invalidity such as 'undue influence')* as submitted in Instruction Number ________."

Committee Comment (1995 New)

A. Will contests are somewhat unique and, in the Committee's judgment, require a burden of proof instruction tailored to fit the issue raised. § 473.081, RSMo, permits a challenge to only a portion of a will. In a case in which only a portion of a will is challenged, the remainder of the will is unchallenged, and no issue would exist as to those matters covered by MAI 15.04; therefore, the proponent of the will would have no burden of proof.

B. If the matter involved is an oral trust, see § 456.4-407, RSMo.

Historical Note

(MAI 15.03 replaces the prior MAI 3.03 from the 6th Edition).

Research References

West's Key Number Digest
Wills ⚷329(3)

Legal Encyclopedias
C.J.S., Wills §§ 21, 772

Annotations

1. In general

In a will contest it was error to put burden of proof on contestant to show decedent was of unsound mind; that burden rests on proponents throughout the trial. *Brug v. Mfrs. Bank & Trust Co.*, 461 S.W.2d 269 (Mo.banc 1970).

Burden of proof instruction submitted by contestants placing upon contestants the burden of showing that decedent was of unsound mind, which cast upon them a greater burden of proof than they were required to meet, was harmless error. *Keifer v. St. Jude's Children's Research Hosp.*, 654 S.W.2d 236 (Mo.App. S.D. 1983).

15.04 [2012 Revision] Verdict Directing

Your verdict must be that the document in issue is [the codicil to] the last will and testament of *(name of testator)* if you believe:

First, the document was signed by *(name of testator)*[1] and declared by that person to be [the codicil to] that person's last will and testament, and

Second, that at the time of signing, *(name of testator)* was of sound and disposing mind and memory,[2] and

Third, that the document was attested by at least two [competent][3] witnesses, signing their names to the document in *(possessive of name of testator)* presence and at *(possessive of name of testator)* request.

* [unless you believe the document in issue is not [the codicil to] the last will and testament of *(name of testator)* by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1978 Revision)

1. In those rare cases where testator did not sign, but directed the signing by another in testator's presence, substitute the words: "The document was signed by *(insert name of person who signed)* at *(name of testator)*'s direction and in *(name of testator)*'s presence."

2. The phrase "sound and disposing mind and memory" must be defined. See definition in MAI 15.01.

3. The term "competent" may be omitted if the competency of the witness is not in issue.

* Add if affirmative defense is submitted.

Committee Comment (2012 Revision)

A. The burden is on the proponent of a will to establish "that said instrument was executed and signed by (decedent) as and for her last will; that the signatures of the attesting witnesses were placed on such paper in her presence, and at her request or with her consent; and that at the time she executed the same she was of sound and disposing mind and memory." *Gordon v. Burris*, 153 Mo. 223, 54 S.W. 546, 550–51 (1899).

B. These issues need not be submitted to the jury unless contestants offer proof to the contrary. In *Fletcher v. Henderson*, 333 Mo. 349, 356, 62 S.W.2d 849, 851 (1933), the court said:

> It was therefore incumbent upon the proponents of the will in the first instance to make proof of the due execution of the will, i.e., compliance with all the requirements and formalities prescribed by statute, and that the testator was at the time of sound mind. When this was done "the weight of the evidence was against the contestant" and it then "became necessary," in order for contestants "to obtain a submission" to the jury of either, that the instrument was not duly executed or testamentary incapacity, as an issue, "to adduce some substantial evidence tending to support" such affirmation "in total default of which" the trial judge could properly direct a finding on such issue in favor of proponents.

C. To the same effect is *Switzer v. Switzer*, 373 S.W.2d 930, 940 (Mo. 1964), where the court said:

> Wills are solemn acts, designed to accomplish a testator's last wishes, and should be overturned only on proper and substantial evidence.

D. In *Pasternak v. Mashak*, 392 S.W.2d 631, 640 (Mo.App. 1965), the court said:

> There is no substantial evidence in this record that the testatrix lacked testamentary capacity at the time the will was executed, and that issue should not have been submitted to the jury.

E. Where only a partial invalidity of a will is claimed under § 473.081, RSMo, this instruction should not be given since only the validity of part of the will is contested. In such a case, see MAI 15.05, 15.06 and 15.10(B).

F. If the instrument involved is a trust, reference should be made to Chapter 456, RSMo, as to the requirements for the creation of a trust and the burden of proof that applies.

Historical Note

(MAI 15.04 replaces the prior MAI 31.06 from the 6th Edition).

Research References

West's Key Number Digest
Wills ⚷333

Annotations

In general 1
Conversing 3
Modification 4
Not in MAI 2

1. In general

In a will contest, it was error to put burden of proof on contestant to show decedent was of unsound mind; that burden rests on proponents throughout the trial. *Brug v. Mfrs. Bank & Trust Co.*, 461 S.W.2d 269 (Mo.banc 1970).

2. Not in MAI

Use of a pre-MAI definition of "sound and disposing memory" that used in the name of the testatrix instead of "a person" in the first paragraph was not prejudicial error. *Arterburn v. Meadows*, 451 S.W.2d 85 (Mo. 1970).

3. Conversing

Since the purpose of MAI is to submit fact issues accurately and concisely, a rambling, argumentative pre-MAI-type defense instruction in a will contest was properly refused. *Barnes v. Marshall*, 467 S.W.2d 70 (Mo. 1971).

Contestants' wordy instruction on testamentary capacity that failed to submit ultimate issue was properly refused. *Earney v. Clay*, 462 S.W.2d 672 (Mo. 1971).

Third-Method converse submitting issue of insane delusion in will contest was error when unsupported by substantial evidence. *Byars v. Buckley*, 461 S.W.2d 817 (Mo. 1970).

4. Modification

In a will contest, including the bracketed word "competent" in proponent's verdict director unnecessary because not in issue; was harmless error. *Martin v. Martin*, 513 S.W.2d 756 (Mo.App. 1974).

15.05 [2012 Revision] Verdict Directing—Partial Invalidity of Will Due to Fraud

In your verdict, you must find that the contested part of the last will and testament of *(name of testator)* providing for *(here insert description of the challenged provision of the will)* is not valid if you believe:

First, *(insert name of person committing fraud)* represented to *(name of testator)* that *(here state the allegedly false representation)*, and

Second, such representation was false, and

Third, *(insert name of person committing fraud)* knew such representation was false, and

Fourth, such representation was intended to and did deceive *(name of testator)*, and

Fifth, *(name of testator)* relied upon such representation, and

Sixth, *(name of testator)* was induced to include the contested part of the will by reason of such representation.

Notes on Use (1995 New)

This instruction will be used where the validity of part of a will is contested for fraud in accordance with § 473.081, RSMo. Where the entire will is challenged under § 473.083, RSMo, see MAI 15.07 and 15.08.

§ 473.081, RSMo, provides for multiple grounds for partial invalidity of a will. See MAI 15.06 regarding partial invalidity of a will due to undue influence. Other grounds of partial invalidity set forth in § 473.081, RSMo, will require submission in accordance with developing substantive law and the method for submission demonstrated in MAI 15.05, 15.06 and 15.10(B).

Historical Note

(MAI 15.05 replaces the prior MAI 31.21 from the 6th Edition).

Research References

West's Key Number Digest
Wills ⚷332, 333

15.06 [2012 Revision] Verdict Directing—Partial Invalidity of Will Due to Undue Influence

In your verdict, you must find that the contested part of the last will and testament of *(name of testator)* providing for *(here insert description of the challenged portion of the will)* is not valid if you believe that *(name of testator)* included the contested part of the will as a result of the undue influence[1] of *(here insert the name of the person who allegedly exerted the undue influence.)*

Notes on Use (2012 Revision)

1. The phrase "undue influence" must be defined. See MAI 15.03.

This instruction will be used where the validity of part of a will is contested for undue influence in accordance with § 473.081, RSMo. Where the entire will is challenged under § 473.083, RSMo, see MAI 15.07 and 15.08.

§ 473.081, RSMo, provides for multiple grounds for partial invalidity of a will. See MAI 15.05 for partial invalidity of a will due to fraud. Other grounds of partial invalidity set forth in § 473.081, RSMo, will require submission in accordance with developing substantive law and the method of submission demonstrated in MAI 15.05, 15.06 and 15.10(B).

Historical Note

(MAI 15.06 replaces the prior MAI 31.22 from the 6th Edition).

Research References

West's Key Number Digest
Wills ⚷332, 333

15.07 [2012 Revision] Affirmative Defense—Fraud Invalidating Will

Your verdict must be that the document in issue is not the last will and testament of *(name of testator)* if you believe:

First, *(insert name of person committing fraud)* represented to *(name of testator)* that *(here state the allegedly false representation)*, and

Second, such representation was false, and

Third, *(insert name of person committing fraud)* knew such representation was false, and

Fourth, such representation was intended to and did deceive *(name of testator)*, and

Fifth, *(name of testator)* relied upon such representation, and

Sixth, *(name of testator)* was induced to sign the document in issue by reason of such representation.

Notes on Use (2012 Revision)

This instruction will be used where the validity of the entire will or codicil is contested under § 473.083, RSMo. Where only part of the will is contested under § 473.081, RSMo, see MAI 15.05.

Historical Note

(MAI 15.07 replaces the prior MAI 32.17 from the 6th Edition).

Research References

West's Key Number Digest
Wills ⚷332

Legal Encyclopedias
C.J.S., Wills § 766

Annotations

1. Modification

Proper verdict-directing instruction submitting testator's intent to cancel will by making alterations. *Watson v. Landvatter*, 517 S.W.2d

117 (Mo.banc 1974).

15.08 [2012 Revision] Affirmative Defense—Undue Influence

Your verdict must be that the document in issue is not the last will and testament of *(name of testator)* if you believe that *(name of testator)* signed the document as a result of the undue influence[1] of *(here insert the name of the person who allegedly exerted the undue influence)*.

Notes on Use (2012 Revision)

1. The phrase "undue influence" must be defined. See definition at MAI 15.03.

This instruction will be used where the validity of the entire will or codicil is contested under § 473.083, RSMo. Where only part of the will is contested under § 473.081, RSMo, see MAI 15.05, 15.06 and 15.10(B).

Historical Note

(MAI 15.08 replaces the prior MAI 32.18 from the 6th Edition).

Research References

West's Key Number Digest
Wills ⚷332

Legal Encyclopedias
C.J.S., Wills § 766

Annotations

1. In general

Settlor's petition for declaratory judgment that family trust had been properly revoked could not be denied on grounds of undue influence, when settlor's son, as trustee, failed to plead affirmative defense of undue influence at any stage in proceedings, and settlor did not impliedly consent to trying such defense. *Holdener v. Fieser*, 971 S.W.2d 946 (Mo.App. E.D. 1998).

Affirmative defense of undue influence. *Martin v. Martin*, 513 S.W.2d 756 (Mo.App. 1974).

15.09 [2012 Revision] Illustration—Will Contest

Charlie Rich died on January 1, 1978, leaving an estate of $800,000. He was 84 at the time of his death. Rich was a widower who had lived with his adult daughter, Ima Rich, his only child. Ima had never married. She cared for her father during the 15 years following her mother's death. Charlie Rich died in the local hospital where he had been a patient for two months. Reverend Longwind of the Temple of Saints Church visited Charlie daily. Two days before his death Charlie made a will (the first he had ever made) leaving Ima $50,000 and the balance of his estate to the Temple of Saints Church. Attorney K.C. Mason, a respected practitioner, who had never represented Charlie previously, prepared the will. K.C. Mason and his secretary, Penny Writer, witnessed the will. The will was offered for probate and accepted. Ima filed a timely petition contesting the validity of the will based on undue influence.

Instruction No. 1

(Same as MAI 2.01)

Note: In will contest cases, MAI 2.01 must be modified as required by Notes on Use.

Instruction No. 2

(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3

(See MAI 2.02)

In returning your verdict you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 4 (See MAI 15.01)

The phrase "sound and disposing mind and memory" as used in these instructions means that when a person signs a will that person:

First, was able to understand the ordinary affairs of life, and

Second, was able to understand the nature and extent of that person's property, and

Third, was able to know the persons who were the natural objects of that person's bounty, and

Fourth, could intelligently weigh and appreciate that person's natural obligations to those persons.

Instruction No. 5 (See MAI 15.02)

The phrase "undue influence" as used in these instructions means such influence as destroys the free choice of the person making the will.

Instruction No. 6 (See MAI 15.03)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon such proposition to cause you to believe that such proposition is more likely to be true than not true.

The burden is upon defendant-proponent, to cause you to believe that the document dated December 29, 1977, is the last will and testament of Charlie Rich.

The burden is upon plaintiff-contestant, to cause you to believe her claim of undue influence as submitted in Instruction Number 9.

In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence.

If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction No. 7 (See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction No. 8 (See MAI 15.04)

Your verdict must be that the document in issue is the last will and testament of Charlie Rich if you believe:

First, the document was signed by Charlie Rich and declared by him to be his last will and testament, and

Second, that at the time of signing, Charlie Rich was of sound and disposing mind and memory, and

Third, that the document was attested by at least two competent witnesses, signing their names to the document in his presence and at his request, unless you believe the document in issue is not the last will and testament of Charlie Rich by reason of Instruction Number 9.

Instruction No. 9 (See MAI 15.08)

Your verdict must be that the document in issue is not the last will and testament of Charlie Rich if you believe that Charlie Rich signed the document as a result of the undue influence of Reverend Longwind.

VERDICT A
(See MAI 15.10(A))

Note: Complete this form by inserting the words required by your verdict.

We, the undersigned jurors, find:

That the document in issue ________ *(here insert either "is" or "is not")* the last will and testament of Charlie Rich.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________

Committee Comment (2012 Revision)

A. In this illustration, there is only one verdict form submitted and, as a result, all instructions are included in one package. MAI 2.05 is not to be used when there is only one verdict form. See MAI 2.00.

B. Illustration 15.09 demonstrates the submission of a will contest action where the validity of the entire will is at issue. § 473.081, RSMo, provides for probate of a portion of a will when only part of the will is challenged because of fraud, duress, undue influence, mistake, ignorance of the testator of its content, partial revocations or other cause. This illustration is not appropriate to submit a case involving a claim of partial invalidity under § 473.081, RSMo. See MAI 15.05, 15.06 and 15.10(B).

Historical Note

(This illustration replaces the prior MAI 35.12 from the 6th Edition).

Research References

West's Key Number Digest
Wills ⚷331(1)

15.10(A) [2012 Revision] Form of Verdict

VERDICT ________[1]

NOTE: Complete this form by writing in the word(s) required by your verdict.

We, the undersigned jurors find:

That the document in issue[2] ________ *(here insert either "is" or "is not")* the last will and testament of *(insert name of decedent).*

NOTE: All jurors who agree to the above must legibly sign or print their names below.

________________________ ________________________

________________________ ________________________

________________________ ________________________

________________________ ________________________

________________________ ________________________

________________________ ________________________

Notes on Use (2012 Revision)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. If more than one document is in issue, modify the instruction to sufficiently identify each document; for example, "the document dated December 29, 1979."

This instruction is to be used in cases where the entire will is contested. For cases involving partial invalidity under § 473.081, RSMo, see MAI 15.10(B).

Historical Note

(MAI 15.10(A) replaces the prior MAI 36.17(A) from the 6th Edition).

Research References

West's Key Number Digest
Wills ⚷331(1)

15.10(B) [2012 Revision] Form of Verdict—Partial Invalidity

VERDICT ________[1]

NOTE: Complete this form by writing in the word(s) required by your verdict.

We, the undersigned jurors find:

That the contested part of the will[2] ________ *(here insert either "is" or "is not")* a valid part of the last will and testament of *(insert name of decedent)*.

NOTE: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________

Notes on Use (2012 Revision)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. If more than one part of the will is contested, modify the verdict form to sufficiently identify each part; for example, "providing $1,000,000 to the neighbor's cat."

This instruction is to be used in cases of partial invalidity under § 473.081, RSMo. For cases where the entire will is contested, see MAI 15.10(A).

Historical Note

(MAI 15.10(B) replaces the prior MAI 36.17(B) from the 6th Edition).

Research References

West's Key Number Digest
Wills ⚷331(1)

16.00

DEFINITIONS—MISCELLANEOUS

16.01 Legal Malice [Withdrawn 1996]
16.01(1) Malice in Law—Liability for Actual Damages in Malicious Prosecution Cases Arising Out of Civil Actions
16.01(2) Legal Malice—Liability for Actual Damages in Malicious Prosecution Cases Arising Out of Criminal Actions
16.02 Fair Market Value
16.03 Good Faith in Ejectment [Withdrawn 2012]
16.04 Substantial Performance
16.05 Malicious Prosecution—Reasonable Grounds—Criminal Action
16.06 Malicious Prosecution—Reasonable Grounds—Civil Action
16.07 Mental Illness—Commitment for Mental Illness
16.08 Inherently Dangerous Activity

Research References

West's Key Number Digest

Contracts 🔑294; Eminent Domain 🔑222(1), 222(4); Malicious Prosecution 🔑72(1), 72(4), 72(5); Mental Health 🔑7; Negligence 🔑305

A.L.R. Library

A.L.R. Index, Ejectment; Eminent Domain; Fair Market Value; Malice; Malicious Prosecution; Negligence

West's A.L.R. Digest, Contracts 🔑294; Eminent Domain 🔑222(1), 222(4); Malicious Prosecution 🔑72(1), 72(4), 72(5); Mental Health 🔑7; Negligence 🔑305

Legal Encyclopedias

Am. Jur. 2d, Contracts § 603; Ejectment § 41; Eminent Domain § 227

C.J.S., Contracts § 1065; Ejectment § 199; Eminent Domain § 453; Malicious Prosecution or Wrongful Litigation §§ 138, 139; Mental Health § 268

16.01 [1996 Withdrawn] Legal Malice

Historical Note

(This instruction, its Notes on Use and Committee Comment are withdrawn. See MAI 16.01(1) for the definition of "malice in law" and MAI 16.01(2) for the definition of "legal malice").

16.01(1) [1996 New] Malice in Law—Liability for Actual Damages in Malicious Prosecution Cases Arising Out of Civil Actions

The term "maliciously" as used in this [these] instruction[s] means intentionally doing a wrongful act without just cause or excuse. It does not necessarily mean hatred, spite or ill will.

Notes on Use (1996 New)

This instruction is for use only in defining "maliciously" as used in MAI 23.07 when submitting the requisite elements for liability for actual damages for malicious prosecution based on the filing of a civil action. See MAI 16.01(2) for the definition of "maliciously" in determining liability for actual damages for malicious prosecution for the instigation of a criminal proceeding. See MAI 10.01 and *Burnett v. Griffith*, 769 S.W.2d 780 (Mo.banc 1989), for submitting punitive damages in a malicious prosecution case.

Where the term is used in only one instruction, this definition may be added to the instruction using the term. If it is used in more than one instruction, the definition may be given as a separate instruction.

Committee Comment (1996 New)

A. *Sanders v. Daniel International Corp.*, 682 S.W.2d 803 (Mo.banc 1984), held that "malice in law" is insufficient to support either actual or punitive damages in a malicious prosecution case arising out of a criminal prosecution. See also *Proctor v. Stevens Employment Services, Inc.*, 712 S.W.2d 684 (Mo.banc 1986), which held that "malice in law" is sufficient to support liability for actual damages in a malicious prosecution case arising out of a civil action.

Research References

West's Key Number Digest
Malicious Prosecution ⚿72(4), 72(5)

Legal Encyclopedias
C.J.S., Malicious Prosecution or Wrongful Litigation § 139

16.01(2) [1996 New] Legal Malice—Liability for Actual Damages in Malicious Prosecution Cases Arising Out of Criminal Actions

The term "maliciously" as used in this [these] instruction[s] means [acting intentionally with an evil motive], [or acting with reckless indifference to the rights of others], [or acting primarily for a purpose other than bringing an offender to justice].[1]

Notes on Use (1996 New)

1. Select the appropriate bracketed phrase or phrases. *Sanders v. Daniel International Corp.*, 682 S.W.2d 803 (Mo.banc 1984), requires this definition for submitting liability for actual damages in a malicious prosecution case arising out of a criminal prosecution.

This instruction is for use only in defining "maliciously" as used in MAI 23.07 when submitting the requisite elements for liability for actual damages for malicious prosecution for the instigation of a criminal judicial proceeding. See MAI 16.01(1) for the definition of "maliciously" in determining liability for actual damages for malicious prosecution based on the filing of a civil action. See MAI 10.01 and *Burnett v. Griffith*, 769 S.W.2d 780 (Mo.banc 1989), for submitting punitive damages in a malicious prosecution case.

Where the term is used in only one instruction, this definition may be added to the instruction using the term. If it is used in more than one instruction, the definition may be given as a separate instruction.

Committee Comment (1996 New)

A. *Sanders v. Daniel International Corp.*, 682 S.W.2d 803 (Mo.banc 1984), held that "malice in law" is insufficient to support either actual or punitive damages in a malicious prosecution case arising out of a criminal prosecution. See also *Proctor v. Stevens Employment Services, Inc.*, 712 S.W.2d 684 (Mo.banc 1986), which held that "malice in law" is sufficient to support liability for actual damages in a malicious prosecution case arising out of a civil action.

Research References

West's Key Number Digest
Malicious Prosecution 🔑72(4), 72(5)

Legal Encyclopedias
C.J.S., Malicious Prosecution or Wrongful Litigation § 139

16.02 [2008 Revision] Fair Market Value

The phrase "fair market value" as used in this [these] instruction[s] means the price that the property in question would bring when offered for sale by one willing but not obliged to sell it and when bought by one willing or desirous to purchase it but who is not compelled to do so.

Notes on Use (2008 Revision)

When the phrase "fair market value" is used in an eminent domain case, see MAI 9.01 and 9.02. In other types of cases involving the fair market value of personal property, the above definition must be used. See MAI 4.02, 4.10 and 4.17.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

Research References

West's Key Number Digest
Eminent Domain ⚷222(4)

Legal Encyclopedias
C.J.S., Eminent Domain § 453

Annotations

In general	**1**
Eminent domain	**3**
Mandatory	**2**

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1. In general

Definition of "Fair Market Value" approved. *Peterson v. Cont'l Boiler Works, Inc.*, 783 S.W.2d 896 (Mo.banc 1990).

Where there was no evidence of reasonable market value of cemetery, court erred in giving MAI 9.02 and 15.02 [Now 16.02], and should have submitted a not-in-MAI damage instruction drafted on the capitalization method. *State ex rel. State Highway Comm'n v. Mount Moriah Cemetery Ass'n*, 434 S.W.2d 470 (Mo. 1968).

Testimony by expert of 20% reduction in automobile's value due to its unknown mileage, along with evidence of numerous repairs, was sufficient to establish automobile's fair market value when purchasers discovered problems with automobile, for purposes of purchasers's damages for breach of warranty against automobile manufacturer, damage instruction for breach of warranty was not required to elaborate on what aspect of product did not conform. *Carpenter v. Chrysler Corp.*, 853 S.W.2d 346 (Mo.App. E.D. 1993).

MAI 16.02 does not give jury "a roving commission." *DeArmon v. City of St. Louis*, 525 S.W.2d 795 (Mo.App. 1975).

Where plaintiffs granted powerline easement for defendant's promise to pay stated amount for each pole installed it was error to give plaintiffs' not-in-MAI instructions authorizing recovery for difference between before and after values, since plaintiffs' recovery was limited to breach of defendant's promise to pay agreed amount. *Shelton v. M & A Elec. Power Coop.*, 451 S.W.2d 375 (Mo.App. 1970).

2. Mandatory

Property damage instruction based on MAI 4.02, which did not define "fair market value," did not prejudice defendant and, thus, was harmless error; damage award showed that jury based its award on the cost of repairing or restoring the property plus the compensation for the lack of use, rather than any decrease in the fair market value, of plaintiffs' property. *Farley v. Wappapello Foods, Inc.*, 959 S.W.2d 888 (Mo.App. S.D. 1997).

Giving a modified MAI 4.02 without definition of fair market value (MAI 16.02) was a roving commission and plain error. *Floyd v. Brenner*, 542 S.W.2d 325 (Mo.App. 1976).

3. Eminent domain

Trial court properly gave MAI Instructions 16.02 and 9.02 on market value in eminent domain proceeding and properly refused landowner's proffered instruction that jurors were to assume that the condemnor would make the fullest use of its right-of-way and use it in a manner as injurious to landowner's remaining rights as would be permitted. *City of Kansas City v. Habelitz*, 857 S.W.2d 299 (Mo.App. W.D. 1993).

16.03 [2012 Withdrawn] Good Faith in Ejectment

Historical Note

(MAI 16.03 (1978 Revision) and its related Notes on Use and Committee Comment have been withdrawn. All instructions relating to Ejectment have been collected in Chapter 27 of MAI — Civil. MAI 16.03 has been replaced by MAI 27.06 (2012 Revision)).

16.04 [1980 New] Substantial Performance

The phrase "substantially performed" as used in this [these] instruction[s] means performance of all important parts of the contract with only slight variations.

Notes on Use (1996 Revision)

Where the phrase "substantially performed" is used, it must be defined. For example, see MAI 26.07.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the term. If it is used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (1980 New)

A. See *Boteler v. Roy*, 40 Mo.App. 234 (1890); *Cross v. Robinson*, 281 S.W.2d 22 (Mo.App. 1955); and *McAlpine Co. v. Graham*, 320 S.W.2d 951 (Mo.App. 1959).

Research References

West's Key Number Digest
Contracts ⚷294

Legal Encyclopedias
C.J.S., Contracts § 1065

Annotations

1. In general

In compliance with Notes on Use, the phrase "substantially performed" must be defined, but in suit based on bank's unauthorized paymenton checking account proceeds, trial court's omission of the definition did not mislead the jury. *Smith v. Am. Bank & Trust Co.*, 639 S.W.2d 169 (Mo.App. W.D. 1982).

16.05 [1996 Revision] Malicious Prosecution—Reasonable Grounds—Criminal Action

The phrase "reasonable grounds" as used in this [these] instruction[s] means the existence of facts which would cause an ordinarily careful person to believe plaintiff *(state the name)* was guilty of the offense charged.

Committee Comment (1996 Revision)

A. The six elements necessary to make a submissible case for malicious prosecution have been: (1) the commencement of a prosecution against plaintiff; (2) its legal causation by defendant; (3) its termination in favor of plaintiff; (4) the absence of probable cause therefor; (5) the presence of malice; and (6) damage to plaintiff therefrom. *Hoene v. Associated Dry Goods Corp.*, 487 S.W.2d 479, 483 (Mo. 1972).

B. Probable cause for the initiation of a criminal prosecution "is reasonable cause and may be defined as the existence of such a state of facts as would warrant an ordinarily cautious and prudent man in the belief that the accused was guilty of the offense charged." *Higgins v. Knickmeyer-Fleer Realty & Inv. Co.*, 335 Mo. 1010, 1026, 74 S.W.2d 805, 813 (1934); *Haswell v. Liberty Mut. Ins. Co.*, 557 S.W.2d 628, 633 (Mo.banc 1977).

C. See MAI 23.07 and 16.01(2).

Research References

West's Key Number Digest
Malicious Prosecution ⚷72(1)

Legal Encyclopedias
C.J.S., Malicious Prosecution or Wrongful Litigation § 138

Annotations

1. In general

Instruction that submits affirmative defense of justification for arrest with less certainty than belief misstates premise of defense; instruction that dilutes that belief by "may have committed" or justifies arrest by suspicion of guilt does not satisfy requirement of probable cause. *Palcher v. J.C. Nichols Co.*, 783 S.W.2d 166 (Mo.App. W.D. 1990).

16.06 [1996 Revision] Malicious Prosecution—Reasonable Grounds—Civil Action

The phrase “reasonable grounds” as used in this [these] instruction[s] means that under the circumstances an ordinarily careful person after having made a reasonable inquiry would have believed the facts alleged and that the judicial proceeding was valid.

Committee Comment (1996 Revision)

A. In *Haswell v. Liberty Mutual Insurance Co.*, 557 S.W.2d 628, 633 (Mo.banc 1977), the court stated:

> However, guilt or innocence of a criminal offense is not involved in a civil case and for that reason the test of probable cause for initiation of a civil action has been stated somewhat differently . . .. Thus, it can be said that probable cause for initiating a civil action consists of a belief in the facts alleged, based on sufficient circumstances to reasonably induce such belief by a person of ordinary prudence in the same situation, plus a reasonable belief by such person that under such facts the claim may be valid under the applicable law.

See *Hughes v. Aetna Ins. Co.*, 261 S.W.2d 942 (Mo. 1953); *Woods v. Standard Pers. Loan Plan, Inc.*, 420 S.W.2d 380 (Mo.App. 1967); *Young v. Jack Boring's, Inc.*, 540 S.W.2d 887 (Mo.App. 1976); Restatement (Second) of Torts § 675 (1977).

B. See MAI 23.07 and 16.01(1).

Research References

West's Key Number Digest
Malicious Prosecution 🔑72(1)

Legal Encyclopedias
C.J.S., Malicious Prosecution or Wrongful Litigation § 138

Annotations

1. In general

“Probable cause” to initiate criminal proceeding sufficient to rebut a claim of malicious prosecution is reasonable grounds for suspicion, supported by circumstances and evidence sufficiently strong to warrant a cautious man in his belief that the person accused is guilty of offense charged. *Thompson v. Wal-Mart Stores, Inc.*, 890 S.W.2d 780 (Mo.App. W.D. 1995).

Employer had probable cause to initiate criminal proceedings against employee for stealing and, thus, was not liable for malicious prosecution where videotape showed employee removing currency from cash register, hiding it and surreptitiously placing it in his pocket, and there was no indication that employee returned the money, or change for the money, to the register. *Thompson v. Wal-Mart Stores, Inc.*, 890 S.W.2d 780 (Mo.App. W.D. 1995).

16.07 [1983 New] Mental Illness—Commitment for Mental Illness

The phrase "mentally ill" or "mental illness" as used in this [these] instruction[s] means a state of impaired mental processes which distorts the respondent's capacity to recognize reality and interferes with the ability to reason, understand or exercise conscious control over respondent's actions. [*(State the condition excluded by § 630.005, RSMo, such as "mental retardation" or "simple intoxication")* by itself is not mental illness.][1]

Notes on Use (1983 New)

1. If there is evidence of both "a mental illness" and one or more of the statutory conditions which are not mental illness standing alone, the bracketed sentence must be added.

When the phrase "mentally ill" or "mental illness" is used, it must be defined.

Where the phrase is used in only one instruction, this definition may be added to the instruction using the phrase. If it is used in more than one instruction, the definition should be given as a separate instruction.

This definition is based on § 630.005, RSMo. The statute also provides that certain conditions, such as mental retardation, simple intoxication or senility, not of an actively psychotic nature, are not mental illness "unless they are accompanied by a mental illness as otherwise defined" in the instruction. If there is evidence of only one of those conditions without evidence of "a mental illness" as defined, there is no submissible case.

Research References

West's Key Number Digest
Mental Health ⚷7

Legal Encyclopedias
C.J.S., Mental Health § 268

16.08 [1992 New] Inherently Dangerous Activity

The term "inherently dangerous activity" as used in this [these] instruction[s] means an activity that necessarily presents a substantial risk of harm unless adequate precautions are taken. [, but does not include a risk of harm that is not inherent in or a normal part of the work to be performed and that is negligently[1] created solely as a result of the improper manner in which the work under the contract is performed.][2]

Notes on Use (1992 New)

1. The term "negligent" or "negligence" must be defined. See MAI 11.00.

2. This bracketed phrase may have some application in some situations. If the law and the evidence support the addition of this bracketed phrase, it should be added to the definition at the request of the defendant. See *Ballinger v. Gascosage Elec. Coop.*, 788 S.W.2d 506, 511 (Mo.banc 1990); and Restatement (Second) of Torts, § 426.

Committee Comment (1996 New)

A. See Committee Comment to MAI 31.15.

Research References

West's Key Number Digest
Negligence ⚿305

Annotations

Collateral negligence 1
Inherently dangerous activity 2

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1. Collateral negligence

Failure of promoter to have medical monitoring and an ambulance present at hotel for boxing match was not "collateral negligence," for purposes of determining whether hotel was vicariously liable to injured boxer under the inherently dangerous activity doctrine; hotel had sufficient warning of the potential risk of harm in failing to prevent further injury from a delay in treatment. *Maldonado v. Gateway Hotel Holdings, L.L.C.*, 154 S.W.3d 303 (Mo.App. E.D. 2003).

2. Inherently dangerous activity

The term "inherently dangerous activity" means an activity that necessarily presents a substantial risk of harm unless adequate precautions are taken. *Maldonado v. Gateway Hotel Holdings, L.L.C.*, 154 S.W.3d 303 (Mo.App. E.D. 2003).

17.00

VERDICT DIRECTING—MOTOR VEHICLES

17.01 Single Negligent Act Submitted
17.02 Multiple Negligent Acts Submitted
17.03 Excessive Speed
17.04 Failure to Act After Danger of Collision Apparent
17.05 Failure to Keep a Lookout
17.06 Failure to Signal Intention to Turn
17.07 Failure to Sound Horn [Withdrawn 2000]
17.08 Failure to Yield Right-of-Way
17.09 Following Too Closely
17.10 Passing on the Right
17.11 Slowing Without Adequate Warning
17.12 Stopping Without Adequate Warning
17.13 Wrong Side of the Road
17.14 Humanitarian Negligence, Compound [Withdrawn 1990]
17.15 Humanitarian Negligence, Disjunctive [Withdrawn 1990]
17.16 Rear End Collision
17.17 Per se Negligence—Improper Turn
17.18 Per se Negligence—Violating Speed Limit
17.19 Unable to Stop Within Range of Vision
17.20 Stopping in Lane Reserved for Moving Traffic
17.21 Driving While Intoxicated

Research References

West's Key Number Digest

Automobiles ⚷246(1), 246(7), 246(19), 246(20)

A.L.R. Library

A.L.R. Index, Automobiles and Highway Traffic; Driving While Intoxicated; Speed; Warnings

West's A.L.R. Digest, Automobiles ⚷246(1), 246(7), 246(19), 246(20)

Legal Encyclopedias

Am. Jur. 2d, Automobiles and Highway Traffic §§ 1054 to 1058, 1042

C.J.S., Motor Vehicles §§ 1471, 1472, 1622

17.01 [1980 Revision] Single Negligent Act Submitted

Your verdict must be for plaintiff[1] if you believe:

First, defendant violated the traffic signal, and

Second, defendant was thereby negligent,[2] and

Third, as a direct result of such negligence[2] plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1996 Revision)

1. In any case involving more than one plaintiff or defendant, any reference to a particular party should include the name of that party, or other descriptive term. Where plaintiff submits against more than one defendant in separate verdict directors, the first line of the verdict director should be modified to indicate the particular defendant covered by this verdict director, e.g.:

> Your verdict must be for plaintiff against defendant John Jones if you believe:

If the verdict director is applicable to the plaintiff's claim against more than one defendant, it can be described as follows:

> Your verdict must be for plaintiff [against both defendants] [against defendant John Jones and defendant Ace Trucking Lines] if you believe:

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (1996 Revision)

A. For modification of verdict directing instructions to submit comparative fault, see MAI 37.01.

B. Where agency is in issue, see MAI 18.01.

C. Where suit involves multiple causes of damages, see MAI 19.01.

D. Where suit is for wrongful death, see MAI 20.01 and 20.02.

E. Where suit is for loss of services or medical expenses of dependent, see MAI 31.04.

F. This instruction submits the single act of violating a traffic signal. For other wrongful acts or omissions that may be hypothesized, see MAI 17.03 to 17.21. For submitting multiple negligent acts, see MAI 17.02.

G. In addition to hypothesizing violation of the signal, the instruction also requires that the jury find that in violating the signal defendant was negligent. Although the violation of a traffic statute or ordinance may be negligence per se (*Rowe v. Kansas City Pub. Serv. Co.*, 241 Mo.App. 1225, 1231, 248 S.W.2d 445, 448 (1952)), it is safer to further hypothesize negligence for "Under the circumstances of a particular case there may be a valid excuse for failing to comply with a statutory rule of the road, as where nonobservance of the statute is induced by considerations of safety . . . or where compliance is impossible . . .." *MacArthur v. Gendron*, 312 S.W.2d 146, 150 (Mo.App. 1958). See also *Lincoln v. Ry. Express Agency, Inc.*, 359 S.W.2d 759, 763 (Mo. 1962), where the court approved an instruction telling the jury that if it found a hypothesized traffic violation, such a violation was negligence. See MAI 33.05(2) regarding legal justification for negligence per se, and the Committee Comment to 33.05(2).

Research References

West's Key Number Digest
Automobiles ⚷246(1)

Annotations

In general 1
Carrier's negligence 11
Changing lanes 6
Defining negligence 2
Deviation 7
Intentional tort 8
Multiple plaintiffs 5
Negating defense 3
Negligence per se 9
Plaintiff's status 4
Rule of the road 10

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1. In general

Where there was evidence that flasher light was not working, it was error to submit a finding that plaintiff failed to heed the flasher light; the word "operating" should have been added. *Silvey v. Mo. Pac. Ry. Co.*, 445 S.W.2d 354 (Mo. 1969).

If verdict directing instruction omits an essential element, it is given in error, and the failure to give an applicable Missouri Approved Instruction (MAI) is error which is presumed prejudicial. *Nagaragadde v.*

Pandurangi, 216 S.W.3d 241 (Mo.App. W.D. 2007)

Homeowner's failure to extinguish an oil ceremonial prayer lamp could not be considered a defective condition of the property itself, and thus, simple negligence instruction, patterned after MAI 17.01, as opposed to instruction on landowner or premises liability, was appropriate to direct the jury's verdict in negligence action brought against homeowner by guest, who was severely burned when her sari caught fire when it came in contact with ceremonial prayer lamp's flame in home of homeowner. *Nagaragadde v. Pandurangi*, 216 S.W.3d 241 (Mo.App. W.D. 2007).

Verdict director against mortician and cemetery for negligent burial. *Golston v. Lincoln Cemetery, Inc.*, 573 S.W.2d 700 (Mo.App. 1978).

Where defendant motorist's duty to take evasive action did not arise until danger was apparent, plaintiff should have modified MAI 17.04 instead of using MAI 17.01 which omits elements of apparent danger and defendant's ability to safely avoid collision thereafter. *Thompson v. Gray*, 415 S.W.2d 299 (Mo.App. 1967).

2. Defining negligence

Where term "negligence" is used it must be defined; failure to do so creates a roving commission. *Brewer v. Swift & Co.*, 451 S.W.2d 131 (Mo.banc 1970).

3. Negating defense

Failure of plaintiff's verdict director submitting multiple acts to negate defense of contributory negligence is reversibly erroneous. *Trimble v. Sipes*, 506 S.W.2d 353 (Mo. 1974).

Unnecessary inclusion of bracketed clause in MAI 17.01 was a minor deviation and harmless. *State Farm Mut. Auto. Ins. Co. v. Jessee*, 523 S.W.2d 832 (Mo.App. 1975).

Plaintiff's failure to negate defendant's erroneous affirmative defense instruction was not error. *Clark v. Campbell*, 492 S.W.2d 7 (Mo.App. 1973).

Plaintiff's failure to negate defendant's contributory negligence instruction is harmless error where the contributory negligence instruction was not supported by evidence and should not have been given. *Corbin v. Wennerberg*, 459 S.W.2d 505 (Mo.App. 1970).

4. Plaintiff's status

Where passenger's recovery against driver depends on his being a "discovered trespasser," that element must be included in his verdict director. *Day v. Mayberry*, 421 S.W.2d 34 (Mo.App. 1967).

5. Multiple plaintiffs

Separate plaintiffs are entitled to give separate verdict directors. *Kennedy v. Tallent*, 492 S.W.2d 33 (Mo.App. 1973).

6. Changing lanes

Rule of the road § 304.015(5)(1), RSMo, concerning 3-lane roads prohibits a change of lanes "until the driver has first ascertained that such movement can be made with safety." Plaintiff properly submitted this by hypothesizing that defendant negligently "moved his cab from his lane of traffic when it was not safe to do so." *Furlow v. Laclede Cab Co.*, 502 S.W.2d 373 (Mo.App. 1973).

7. Deviation

Plaintiffs' verdict director, MAI 17.15, omitted the word "negligently" from paragraph Fifth, thereby being a prejudicially erroneous deviation. *Epple v. W. Auto Supply Co.*, 548 S.W.2d 535 (Mo.banc 1977).

Modifying plaintiff's verdict-directing stop-sign instruction by substituting "failed to stop" for the prescribed words, "violated the stop-sign" held harmless error. *Phelps v. Parker*, 569 S.W.2d 22 (Mo.App. 1978).

Omission of "and" between numbered paragraphs was presumptively prejudicial. *Kirkendall v. Townsend*, 559 S.W.2d 561 (Mo.App. 1977).

Omission of "and" between paragraphs of verdict director is error. *Wilkerson v. State Farm Mut. Auto. Ins. Co.*, 510 S.W.2d 50 (Mo.App. 1974).

Submitting claims of co-plaintiffs, motorist and passengers, by a single verdict director was error but held harmless where each plaintiff submitted a separate damage instruction and a separate form of verdict instruction. All instructions are read together. *Hampton v. Cantrell*, 464 S.W.2d 744 (Mo.App. 1971).

MAI 17.02 was not erroneously modified in changing "violated the traffic signal" to read "failed to stop at the stop sign," but it was error to add a detailed description of the stop sign's location. *Brittain v. Clark*, 462 S.W.2d 153 (Mo.App. 1970).

Use of "or" between First and Second paragraphs of verdict director is error since that allows the jury to find for plaintiff if it believes either rather than both paragraphs. *Quality Dairy Co. v. Openlander*, 456 S.W.2d 608 (Mo.App. 1970).

8. Intentional tort

Where plaintiff's substantive right arose from defendant's deliberately shooting him, it was error to refuse MAI 23.02 (battery, an intentional act) and to give instead modified MAI 17.01 (negligent act). *Martin v. Yeoham*, 419 S.W.2d 937 (Mo.App. 1967).

9. Negligence per se

Where plaintiff's verdict director submitted facts constituting negligence per se and did not require a finding defendant was negligent, it was error to give defendant's converse to find for defendant if he was not negligent as submitted in plaintiff's verdict director. *Oventrop v. Bi-State Dev. Agency*, 521 S.W.2d 488 (Mo.App. 1975).

Where not-in-MAI verdict-director hypothesized facts constituting violation of fire ordinance, it was not necessary to hypothesize negligence. *Derboven v. Stockton*, 490 S.W.2d 301 (Mo.App. 1972).

Plaintiff's verdict-directing instruction properly omitted submission of negligence where evidence showed defendant failed to drive as close as practical to right-hand edge of the highway. (§ 304.018.1(1), RSMo) *Condos v. Associated Transps., Inc.*, 453 S.W.2d 682 (Mo.App. 1970).

10. Rule of the road

Plaintiff properly submitted that defendant negligently failed to drive in the right-hand lane at less than normal speed (§ 304.015.5(3), RSMo) without negating statutory exceptions. *Rooney v. Lloyd Metal Prods. Co.*, 458 S.W.2d 561 (Mo. 1970).

Plaintiff properly submitted that defendant negligently drove at less than 40 miles per hour minimum speed (§ 304.010(4), RSMo) without negating statutory exception that safety required a slower speed. *Rooney v. Lloyd Metal Prods. Co.*, 458 S.W.2d 561 (Mo. 1970).

11. Carrier's negligence

Plaintiff bus passenger properly submitted defendant negligently violated a railroad crossing signal under modified MAI 17.01; that did not submit an illegal act. *Myers v. Bi-State Dev. Agency*, 567 S.W.2d 638 (Mo.banc 1978).

MAI 17.01 modified to submit carrier's negligence in failing to move cargo with reasonable dispatch. *Bunge Corp. v. Valley Line Supply & Equip. Co.*, 480 S.W.2d 859 (Mo. 1972).

17.02 [1980 Revision] Multiple Negligent Acts Submitted

Your verdict must be for plaintiff[1] if you believe:

First, either:

defendant failed to keep a careful lookout, or

defendant drove at an excessive speed, or

defendant's automobile was on the wrong side of the road, and

Second, defendant, in any one or more of the respects submitted in paragraph First, was thereby negligent,[2] and

Third, as a direct result of such negligence,[2] plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1996 Revision)

1. In any case involving more than one plaintiff or defendant, any reference to a particular party should include the name of that party, or other descriptive term. Where plaintiff submits against more than one defendant in separate verdict directors, the first line of the verdict director should be modified to indicate the particular defendant covered by this verdict director, e.g.:

> Your verdict must be for plaintiff against defendant John Jones if you believe:

If the verdict director is applicable to the plaintiff's claim against more than one defendant, it can be described as follows:

> Your verdict must be for plaintiff [against both defendants] [against defendant John Jones and defendant Ace Trucking Lines] if you believe:

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

This instruction submits three improper acts in the disjunctive. This instruction should be used as the format for any of the specifications of negligence shown separately throughout Chapter 17.00 except where the full verdict directing instruction is shown as in MAI 17.14 through MAI 17.18.

As is the case with all disjunctive submissions, there must be sufficient evidence to support all of the improper acts or the instruction will be erroneous.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (1996 Revision)

A. For modification of verdict directing instructions to submit comparative fault, see MAI 37.01.

B. Where agency is in issue, see MAI 18.01.

C. Where suit involves multiple causes of damage, see MAI 19.01.

D. Where suit is for wrongful death, see MAI 20.01 and 20.02.

E. Where suit is for loss of services or medical expenses of dependent, see MAI 31.04.

F. For other acts or omissions which may be hypothesized, see MAI 17.03 through MAI 17.21. For submitting a single negligent act, see MAI 17.01.

G. See the last paragraph of the Committee Comment following MAI 17.01.

Research References

West's Key Number Digest
Automobiles ⚿246(1)

Annotations

In general 1
Apparent danger 4
Defining negligence 5
Deviation 3
Modification 2

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1. In general

Defendant not in error in submitting her counterclaim on MAI 32.01 (drove on the wrong side of the road) since it had not been amended to conform to MAI 17.13, amended (was on the wrong side of the road). *Pittock v. Gardner*, 530 S.W.2d 217 (Mo.banc 1975).

Contributory negligence instruction submitting defendant's multiple disjunctive acts must have evidentiary support for each. *Saupe v. Kertz*, 523 S.W.2d 826 (Mo.banc 1975).

Each of two multiple submissions of negligence must be supported by evidence. *Commerford v. Kreitler*, 462 S.W.2d 726 (Mo. 1971).

Error to combine general negligence (driving off road) with specific negligence (failure to keep a lookout). *Skiles v. Schlake*, 421 S.W.2d 244 (Mo. 1967).

In disjunctive submissions, each element must be supported by evidence. *Wolfe v. Harms*, 413 S.W.2d 204 (Mo. 1967).

Motorist's claim that trial court erred in refusing to instruct the jury under the rear-end collision verdict director and by instead giving verdict director based on a combination of multiple negligent acts submitted and failure to act after danger of collision was apparent was preserved for appeal in motorist's negligence action against driver who rear-ended motorist's vehicle, given that motorist objected to the content of the instruction, both when submitted and in her motion for new trial. *Clark v. Belfonte Distrib., Inc.*, 163 S.W.3d 581 (Mo.App. W.D. 2005).

Submission of disjunctive charges of general negligence (failure to maintain control) and specific negligence (excessive speed) was error, in that instruction did not confine jury to factual issues but permitted jury to speculate on other omissions in the nature of a roving commission. *Hicks v. Graves Truck Lines, Inc.*, 707 S.W.2d 439 (Mo.App. W.D. 1986).

Evidence supported each element of verdict director based on failure to yield right-of-way, lookout and excessive speed. *Yust v. Link*, 569 S.W.2d 236 (Mo.App. 1978).

Verdict director submitting three assignments of negligence erroneous where evidence supported only two submissions. *Bunch v. McMillian*, 568 S.W.2d 809 (Mo.App. 1978).

Each alternative submission must have evidentiary support. *Rakestraw v. Norris*, 478 S.W.2d 409 (Mo.App. 1972).

Error to submit driving on wrong side of the road or failure to keep a lookout where evidence failed to show causal connection between failure to keep a lookout and the collision. *Shelton v. Bruner*, 449 S.W.2d 673 (Mo.App. 1969).

Plaintiff bus passenger was injured in a right-angle collision between bus and motor vehicle at intersection controlled by stop lights. Each of plaintiff's verdict directors submitted the same negligence against bus company and motorist: failing to keep a lookout or violating the traffic light. Held erroneous as conflicting. *Alfultis v. Bi-State Dev. Agency*, 439 S.W.2d 206 (Mo.App. 1969).

2. Modification

Plaintiff bus passenger properly submitted defendant negligently violated a railroad crossing signal under modified MAI 17.01; that did not submit an illegal act. *Myers v. Bi-State Dev. Agency*, 567 S.W.2d 638 (Mo.banc 1978).

Failure of plaintiff's verdict director submitting multiple acts to negate defense of contributory negligence is reversibly erroneous. *Trimble v. Sipes*, 506 S.W.2d 353 (Mo. 1974).

Modified MAI 17.02 verdict director submitting defendant's failure to obey rules of the road and have truck under control erroneous for submitting "a general hypothesis of negligence" rather than "an ultimate issue". *McIntyre v. Whited*, 440 S.W.2d 449 (Mo. 1969).

There is no MAI for the submission of toxic tort negligence. A modification of MAI 17.02 was appropriate for the submission of each of plaintiff's negligence causes of action. *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 204 (Mo.App. W.D. 1988).

Where plaintiff submitted failure to use the "highest degree of care" but did not submit that defendant was negligent, error to give defendant's converse based only on defendant's "negligence." *Doyle v. Bi-State Dev. Agency*, 628 S.W.2d 695 (Mo.App. E.D. 1982).

A not-in-MAI contributory negligence instruction properly submitted, in the conjunctive, plaintiff's failure to keep a careful lookout and permitting his truck to contact an electric wire that was in plain view. *Robinett v. Kansas City Power & Light Co.*, 484 S.W.2d 506 (Mo.App. 1972).

Court properly refused instruction which modified paragraph Third to read ". . . such negligence caused . . . the collision . . .." since that relieved plaintiff of her burden of proving defendant's negligence caused plaintiff's damage. *Daniels v. Smith*, 471 S.W.2d 508 (Mo.App. 1971).

Modified MAI 17.02 submitting violation of stop sign or driving with inadequate brakes was not erroneous for submitting inconsistent theories of recovery. *Hampton v. Cantrell*, 464 S.W.2d 744 (Mo.App. 1971).

MAI 17.02 modified as a not-in-MAI verdict director in plaintiff's action for injuries by uninsured motorist. *Goodson v. M.F.A. Ins. Co.*, 429 S.W.2d 294 (Mo.App. 1968).

3. Deviation

Omission of word "either" in disjunctive submission, and using "on" instead of "in" in

MAI 17.02, held not prejudicial. Absolute perfection not required; substantial compliance suffices. *Johnson v. West*, 416 S.W.2d 162 (Mo. 1967).

Submitting "slackened his speed, swerved and sounded a warning" was an erroneous conjunctive submission. *Cassin v. Theodorow*, 504 S.W.2d 203 (Mo.App. 1973).

Omission of word "either" in disjunctive submission not prejudicial error. *Riley v. Bi-State Transit Sys.*, 459 S.W.2d 753 (Mo.App. 1970).

Use of "or" between First and Second paragraphs of verdict director is error since that allows the jury to find for plaintiff if it believes either rather than both paragraphs. *Quality Dairy Co. v. Openlander*, 456 S.W.2d 608 (Mo.App. 1970).

Since the minor plaintiff's contributory negligence was not in issue, adding "regardless of any act or conduct on his part," and other language, to MAI 17.02 is error. *Slyman v. Grantello*, 429 S.W.2d 282 (Mo.App. 1968).

Connective words following multiple submissions should read "in one or more of the respects" not "thereby." *Moore v. Huff*, 429 S.W.2d 1 (Mo.App. 1968).

4. Apparent danger

Error to use MAI 17.02 in submitting failure to swerve without "apparent danger" clause of MAI 17.04. *Sweatman v. McClure*, 416 S.W.2d 665 (Mo.App. 1967).

5. Defining negligence

Where term "negligence" is used it must be defined; failure to do so creates a roving commission. *Brewer v. Swift & Co.*, 451 S.W.2d 131 (Mo.banc 1970).

17.03 [1965 New] Excessive Speed

Defendant drove at an excessive speed.

Notes on Use (1990 Revision)

This is an optional submission of negligence which may be used as paragraph First of Verdict Directing 17.01 or as one of the alternate submissions in paragraph First of Verdict Directing 17.02. It may also be used as a submission in wrongful death cases, see MAI 20.01 and 20. 02; and in comparative fault submissions, see MAI 37.02.

Committee Comment (1965 New)

A. Excessive speed, negligence, causation and injury have been held to be the proper basis for a verdict directing instruction. *Knight v. Richey*, 363 Mo. 293, 301, 250 S.W.2d 972, 977 (1952). See also *Brooks v. Mock*, 330 S.W.2d 759, 765 (Mo. 1959).

Research References

West's Key Number Digest
Automobiles ⚷246(20)

Legal Encyclopedias
C.J.S., Motor Vehicles § 1472

Annotations

In general 1
Evidentiary support 2
Modification 3

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1. In general

Case may not be submitted on disjunctive charges of general and specific negligence because to do so leaves jury free to speculate, outside factual submission, on other omissions. *Nakata by Nakata v. Platte Cty. R-3 Sch. Dist.*, 750 S.W.2d 669, 672 (Mo.App. W.D. 1988).

2. Evidentiary support

Evidence supported each element of verdict director based on failure to yield right-of-way, lookout and excessive speed. *Yust v. Link*, 569 S.W.2d 236 (Mo.App. 1978).

3. Modification

Error to modify MAI 17.03, Excessive Speed, by inserting "under the circumstances." *Strickland v. Barker*, 436 S.W.2d 37 (Mo. 1969).

17.04 [1978 Revision] Failure to Act After Danger of Collision Apparent

Defendant knew or by the use of the highest degree of care[1] could have known that there was a reasonable likelihood of collision in time thereafter to have *(insert one or more of the following)*

stopped, or

swerved, or

slackened speed, or

sounded a warning, or

slackened speed and swerved, or

slackened speed and sounded a warning, or

swerved and sounded a warning

but defendant failed to do so.

Notes on Use (1990 Revision)

Caution: Do not omit the last phrase of this instruction: it is required whenever this instruction is used.

1. The phrase "highest degree of care" must be defined. See definitions at MAI 11.01 or MAI 11.03.

Use one or more of the specifications of conduct provided. If more than one are used, they must be submitted in the disjunctive.

The specifications of conduct listed in this instruction are not to be used alone as a complete specification of negligence; the portion of the instruction preceding the parenthetical phrase and the last phrase of the instruction must be used whenever this instruction is given.

This is an optional submission of negligence which may be used as paragraph First of Verdict Directing 17.01 or as one of the alternate submissions in paragraph First of Verdict Directing 17.02. It may be used as a submission in wrongful death cases, see MAI 20.01 and 20.02; and in comparative fault submissions, see MAI 37.02.

Committee Comment (1965 New)

A. In *Greenwood v. Bridgeways, Inc.*, 243 S.W.2d 111, 114 (Mo.App. 1951) the court, quoting *Stakelback v. Neff*, 13 S.W.2d 575, 577 (Mo.App. 1929), said:

> Even though it is true that this instruction counts upon primary negligence, and not the humanitarian doctrine, there was nevertheless no duty upon defendant to take any of the precautions hypothesized therein, unless there was apparent danger of a collision . . .. It cannot be said that the law imposes the duty upon the driver of an automobile, upon approaching and entering an intersecting street, to stop, decrease the speed of, or change the course of, his car, merely because he sees another automobile in the street ahead of him. To the contrary, such duty to act would clearly not arise, unless the exercise of due care upon the part of the driver would lead him to believe that otherwise a collision would occur.

B. See also *Chailland v. Smiley*, 363 S.W.2d 619 (Mo.banc 1963); *Anderson v. Bell*, 303 S.W.2d 93 (Mo. 1957); *Alwood v. St. Louis Pub. Serv. Co.*, 238 S.W.2d 868 (Mo.App. 1951); *Nydegger v. Mason*, 315 S.W.2d 816 (Mo. 1958).

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1. Evidentiary support

Having ability to avoid a collision means not only necessary mechanical appliances but also sufficient time and distance to take effective action. *Saupe v. Kertz*, 523 S.W.2d 826 (Mo.banc 1975).

On issue of negligent failure to avoid a collision, evidence must show defendant had the time and distance within which to take effective evasive action. *Cook v. Cox*, 478 S.W.2d 678 (Mo. 1972).

Giving of instruction, patterned on approved jury instruction regarding failure of injured party to stop or swerve to avoid collision, is appropriate only where evidence shows party had sufficient time, distance means and ability, considering movement and speeds of vehicles, to stop or swerve to avoid collision but failed to do so. *Frazier v. Emerson Elec. Co.*, 867 S.W.2d 700 (Mo.App. E.D. 1993).

In negligence action arising from driver's collision with tractor trailer, sufficient evidence existed to show that driver could have stopped or swerved to warrant submitting comparative fault instruction to jury; no evidence was present to indicate that driver attempted to stop or swerve, and driver had eight seconds of reaction time after headlights of jack-knifing tractor trailer would have been visible bumping up and down and sweeping at angles. *Frazier v. Emerson Elec. Co.*, 867 S.W.2d 700 (Mo.App. E.D. 1993).

To warrant submission of verdict directing instruction for failure to act after danger of collision is apparent, evidence must be presented that plaintiff had means and ability to avoid collision by doing each act described in the instruction. *Gardner v. Reynolds*, 775 S.W.2d 173 (Mo.App. W.D. 1989).

"Failure to swerve" instruction was properly refused where plaintiff failed to show that defendant had the means and ability to avoid the collision by swerving. *Kilgore v. Linville*, 733 S.W.2d 62 (Mo.App. E.D. 1987).

To submit either "failure to swerve" or "lookout" instructions, plaintiff in an automobile negligence case had to show when defendant knew or should have known about the potential danger, and that defendant had sufficient time to take effective precautionary action. *Morgan v. Toomey*, 719 S.W.2d 129 (Mo.App. E.D. 1986).

2. Conjunctive submission

A modified MAI 17.04 submitting that defendant could have avoided the collision if he had "swerved, slackened his speed, swerved and sounded a warning" submitted three separate theories of recovery conjunctively and violated MAI 1.02. *Cook v. Cox*, 478 S.W.2d 678 (Mo. 1972).

Submitting "slackened his speed, swerved and sounded a warning" was an erroneous conjunctive submission. *Cassin v. Theodorow*, 504 S.W.2d 203 (Mo.App. 1973).

3. Apparent danger

Submission of contributory negligence in overtaking defendant's car as it made a sudden left-hand turn was erroneous for failure to include element of apparent danger (as in MAI 17.04). *Schlegel v. Knoll*, 427 S.W.2d 480 (Mo. 1968).

Failing to slacken speed or to swerve must be submitted under MAI 17.04 (Failure to Act After Danger Apparent). *Hecker v. Schwartz*, 426 S.W.2d 22 (Mo. 1968).

Error to submit failure to swerve without submitting danger of collision required by MAI 17.04. *Hunter v. Norton*, 412 S.W.2d 163 (Mo. 1967).

Instruction, in case in which plaintiff was hit by a pickup truck backing out of alley, on whether plaintiff could have moved to place of safety, but failed to do so, did not give jury roving commission since jury could have found that plaintiff should have known of impending danger and had ample room to move to avoid further contact with pickup. *Miller v. Hanna*, 757 S.W.2d 301, 302–03 (Mo.App. W.D. 1988).

Verdict director—entering narrow bridge with bulldozer. *State ex rel. State Highway Comm'n v. Beaty*, 505 S.W.2d 147 (Mo.App. 1974).

Plaintiff entitled to submit defendant's failure to stop at intersection when there was "a reasonable likelihood of collision" even though there was no evidence of precise speeds and stopping distances. *Jefferies v. Saalberg*, 448 S.W.2d 288 (Mo.App. 1969).

Error to use MAI 17.02 in submitting failure to swerve without "apparent danger" clause of MAI 17.04. *Sweatman v. McClure*, 416 S.W.2d 665 (Mo.App. 1967).

4. Modification

Motorist's claim that trial court erred in refusing to instruct the jury under the rear-end collision verdict director and by instead giving verdict director based on a combination of multiple negligent acts submitted and failure to act after danger of collision was apparent was preserved for appeal in motorist's negligence action against driver who rear-ended motorist's vehicle, given that motorist objected to the content of the instruction, both when submitted and in her motion for new trial. *Clark v. Belfonte Distrib., Inc.*, 163 S.W.3d 581 (Mo.App. W.D. 2005).

Where defendant motorist's duty to take evasive action did not arise until danger was apparent, plaintiff should have modified MAI 17.04 instead of using MAI 17.01 which omits elements of apparent danger and defendant's ability to safely avoid collision thereafter. *Thompson v. Gray*, 415 S.W.2d 299 (Mo.App. 1967).

5. Deviation

Substituting "to have stopped" for "to stop" in MAI 17.04 was harmless error. *Offenbacker v. Sodowsky*, 499 S.W.2d 421 (Mo. 1973).

Substituting "exercise" for "use" concerning degree of care not prejudicial. *Joly v. Wippler*, 449 S.W.2d 565 (Mo. 1970).

Substituting "applied her brakes" for "slackened her speed" in MAI 17.04 was prejudicial error. *Motsinger v. Queen City Casket Co.*, 408 S.W.2d 857 (Mo. 1966).

Jury instruction prescribing precise action that plaintiff could have taken to have moved to a place of safety would violate concept of pattern instruction by submitting evidentiary details to jury rather than ultimate issues. *Miller v. Hanna*, 757 S.W.2d 301, 303 (Mo.App. W.D. 1988).

In action in which motorcyclist sought to recover for injuries he sustained in avoiding highway collision with driver of pickup truck, substitution of "accident" for "collision" in contributory negligence instruction did not adequately direct jury's deliberation to acts defendant claimed amounted to contributory negligence. *Large v. Carr*, 670 S.W.2d 71 (Mo.App. E.D. 1984).

Omission of "the use of" from instruction not harmless error. *Jenkins v. Keller*, 579 S.W.2d 166 (Mo.App. S.D. 1979).

Error to submit the element of causation in MAI 17.04 by adding the phrase "and thereby have avoided the accident," after the submitted act. *Brittain v. Clark*, 462 S.W.2d 153 (Mo.App. 1970).

6. Degree of care

Persons operating motor boats, vessels, or water crafts are required tc exercise the highest degree of care. *Pendergraft v. Stewart*, 123 S.W.3d 920 (Mo.App. S.D. 2004).

Minor operating a lawn mower must use the highest degree of care because the lawn mower was a motor vehicle for the purpose of § 301.010(33), RSMo. *Stonger ex rel. Stonger v. Riggs*, 85 S.W.3d 703 (Mo.App. W.D. 2002).

Person of any age riding a bicycle on a roadway must exercise the highest degree of care. *Root By and Through Root v. Mudd*, 981 S.W.2d 651 (Mo.App. W.D. 1998).

Error to submit failure to sound a horn where only evidence was answer of witness that she did not recall hearing a horn. *Baker v. Brinker*, 585 S.W.2d 256 (Mo.App. E.D. 1979).

7. Proximate cause

Having ability to avoid a collision means not only necessary mechanical appliances but also sufficient time and distance to take effective action. *Saupe v. Kertz*, 523 S.W.2d 826 (Mo.banc 1975).

Giving MAI 17.04 is proper only where evidence shows defendant could have taken effective evasive action after collision became actually or constructively apparent. *Bolhofner v. Jones*, 482 S.W.2d 80 (Mo.App. 1972).

8. Swerving

Intersectional collision. Where evidence was that defendant swerved to the left, it was error for plaintiff to modify MAI 17.15 by hypothesizing defendant's negligence in failing to swerve "to the right." *Bougeno v. Thompson*, 499 S.W.2d 506 (Mo.banc 1973).

Submission of failure to swerve properly refused absent showing of available time and space. *Middleman v. Complete Auto Transit, Inc.*, 486 S.W.2d 456 (Mo.banc 1972).

Giving of pattern instruction on motorist's duty to swerve to avoid collision is proper only where there is evidence that driver had sufficient time, distance, means, and ability, considering movement and speeds of vehicles, to stop or swerve to avoid collision but failed to do so. To submit instruction on failure of defendant to swerve to avoid collision, plaintiff has to show when potential danger of collision should have become actually or constructively apparent to defendant, and also that defendant had sufficient time thereafter to swerve or to take other effective precautionary action. *Hollis v. Blevins*, 927 S.W.2d 558 (Mo.App. S.D. 1996).

Error to modify MAI 17.15 by submitting failure to swerve "to the right." *Ritter v. Lindberg Acoustics, Inc.*, 501 S.W.2d 207 (Mo.App. 1973).

9. Slackening speed and lookout

Error to submit MAI 17.04 (slackening speed) without requiring finding of apparent danger, even when combined with MAI 17.05 (failure to keep a lookout) which does not require that element. *Hawkeye-Sec. Ins. Co. v. Thomas Grain Fumigant Co.*, 407 S.W.2d 622 (Mo.App. 1966).

10. Contributory negligence

Plaintiff's contributory negligence properly submitted by incorporating MAI 17.04—Failure to Act After Danger Apparent—in MAI 32. 01. *Creager v. Chilson*, 453 S.W.2d 941 (Mo. 1970).

The Notes on Use to MAI 17.04 indicate that one or more of the specifications provided therein may be submitted as an act of contributory negligence as well, but they also provide that the phrase "highest degree of care" must be defined. The language is mandatory, not permissive, and failure to follow is presumed to be error. *Kindle v. Keene*, 676 S.W.2d 82 (Mo.App. S.D. 1984).

11. Warning

Instruction submitting plaintiff-passenger's contributory negligence in failing to warn defendant-driver of impending danger. *Worley v. Tucker Nevils, Inc.*, 503 S.W.2d 417 (Mo.banc 1973).

17.05 [1965 New] Failure to Keep a Lookout

Defendant failed to keep a careful lookout.

Notes on Use (2012 Revision)

In order to use this submission, there must be evidence to support a finding that a driver had the means and ability to have avoided a collision. *Hayes v. Price*, 313 S.W.3d 645, 650 (Mo.banc 2010).

This is an optional submission of negligence that may be used as paragraph First of Verdict Directing 17.01 or as one of the alternate submissions in paragraph First of Verdict Directing 17.02. It may also be used as a submission in wrongful death cases, see MAI 20.01 and 20. 02; and in comparative fault submissions, see MAI 37.02.

Committee Comment (2012 Revision)

A. Negligently failing to keep a careful lookout with a resulting injury has been held to be a proper basis of recovery. *Anderson v. Bell*, 303 S.W.2d 93 (Mo. 1957). In *Jenkins v. Wabash Railroad Co.*, 322 S.W.2d 788, 798 (Mo. 1959), the Missouri Supreme Court quoted *Fortner v. St. Louis Public Service Co.*, 244 S.W.2d 10, 14 (Mo. 1951), with approval the following statement: "In a primary negligence case it should be sufficient if a jury is authorized to find that a defendant was negligent specifically in failing to keep a proper lookout, . . . and that such negligence directly caused plaintiff's injuries."

B. "[I]t is 'unnecessary to submit the further hypothesis that by keeping a proper lookout defendant could have seen plaintiff' or could have averted the collision." *Lincoln v. Ry. Express Agency, Inc.*, 359 S.W.2d 759, 768 (Mo. 1962).

C. It is error to submit failure to keep a lookout unless there is evidence from which the jury could find that the defendant could have seen the object in question sooner than defendant did. *Levin v. Caldwell*, 285 S.W.2d 655, 659 (Mo. 1956); *O'Neill v. Claypool*, 341 S.W.2d 129, 135 (Mo. 1960).

D. In *Harris v. Mound City Yellow Cab Co.*, 367 S.W.2d 43, 50 (Mo.App. 1963), the court said:

> Since Instruction No. 8 in the instant case required the jury to find affirmatively that the driver of the cab failed to keep a proper lookout for other vehicles, including that of defendant Simms, and that such failure was negligence and caused or contributed to cause the collision, such charge is equivalent to a requirement that the jury find the cab driver could have seen the other vehicle if he had looked.

E. The case of *Chandler v. Mueller*, 377 S.W.2d 288 (Mo. 1964), held that the evidence did not justify this submission where the offending party testified that he did keep a lookout although his conduct was more consistent with failing to keep a lookout.

F. Compare *Zalle v. Underwood*, 372 S.W.2d 98 (Mo. 1963), where the court held an instruction submitting failure to keep a lookout was error because the evidence did not show that such failure caused the accident.

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1. In general

Adding words "for an approaching train" to failure-to-keep-a-lookout submission was unjustified. *Silvey v. Mo. Pac. Ry. Co.*, 445 S.W.2d 354 (Mo. 1969).

Where plaintiff's verdict director submitted defendant's failure to keep a lookout, it was error to give MAI 14.02 defining right-of-way, an element not applicable to the issues. *Corbin v. Wennerberg*, 459 S.W.2d 505 (Mo.App. 1970).

Where passenger's case was tried on theory that bus driver negligently failed to keep a lookout for a depression, MAI 17.05 was appropriate, and it was error to submit plaintiff's case on a modified MAI 17.01 to 26.02(1) [Now 31.02(1)] hypothesizing that driver negligently drove into the depression. The instruction given would unduly extend the res ipsa doctrine. *Routt v. Bi-State Transit Dev. Agency*, 423 S.W.2d 202 (Mo.App. 1967).

2. Evidentiary support

Error in giving instruction on failure to keep a careful lookout unless there is substantial evidence from which the jury could find that, in the exercise of the highest degree of care, had the defendant kept a careful lookout, he could have seen the other vehicle in time to have taken effective precautionary action. *Hayes v. Price*, 313 S.W.3d 645 (Mo.banc 2010).

Comparative fault instruction based on failure to keep a careful lookout was not supported by evidence where no evidence showed that plaintiff motorcyclist, who had right-of-way and was traveling at safe speed, could or should have seen any indication of a danger at a time that would allow him to have the means and ability to use an evasive action to avoid the collision. *Hayes v. Price*, 313 S.W.3d 645 (Mo.banc 2010).

Circumstantial evidence may suffice to support submission of failure to keep a lookout. *Commerford v. Kreitler*, 462 S.W.2d 726 (Mo. 1971).

Fact that plaintiff walked into the path of a clearly visible automobile is sufficient to support an instruction on failing to keep a careful lookout. *Young v. Grotsky*, 459 S.W.2d 306 (Mo. 1970).

Evidence that driver "did not watch ahead with sufficient diligence to permit timely action" was enough evidentiary support to give MAI on failure to keep a careful lookout. *Welch v. Sheley*, 443 S.W.2d 110 (Mo. 1969).

Proper to refuse lookout instruction absent evidence showing failure to keep a lookout. *McDowell v. Mohn*, 426 S.W.2d 95 (Mo. 1968).

Failure-to-keep-careful-lookout instruction was supported by evidence that defendant, who had been stopped at stop sign before proceeding into intersection, had unobstructed view of 1,125 feet in direction from which car in which plaintiff was riding was approaching, and that defendant's car was still stopped when other car was only 20 feet from intersection, in middle of line of cars, and traveling with flow of traffic in 35 mile-per-hour zone. *Hudson v. Whiteside*, 34 S.W.3d 420 (Mo.App. W.D. 2000).

Instructions submitting "failure to keep a careful lookout" must be supported by evidence that operator of vehicle could have avoided collision if careful lookout had been maintained, although instruction need not hypothesize means of avoidance; "lookout" disjunctive submission was erroneous where defendant driver stopped vehicle in a lane reserved for moving traffic and did not see plaintiff's approaching vehicle prior to collision; evidence was insufficient to support "lookout" submission where plaintiff introduced no evidence as to when defendant saw or could have seen plaintiff's vehicle or what defendant could have done to have avoided accident if he had seen approach of vehicle. *Pringle v. State Highway Comm'n*, 831 S.W.2d 735 (Mo.App. S.D. 1992).

Evidence that school bus driver failed to see child walking along side of street after dropping her off, and struck her while travelling at speed of 5 miles per hour, was sufficient to establish submissible case of negligence based on failure to keep careful lookout. *Countryman v. Seymour R-II Sch. Dist.*, 823 S.W.2d 515 (Mo.App. S.D. 1992).

Submission on a failure to keep a lookout contains two inherent components—the ability to see and the ability, including the time and the means, to avoid—and it is plaintiff's burden to supply substantial evidence on both components. *Bell v. United Parcel Serv.*, 724 S.W.2d 682 (Mo.App. E.D. 1987).

To submit either "failure to swerve" or "lookout" instructions, plaintiff in an automobile negligence case had to show when defendant knew or should have known about the potential danger, and that defendant had sufficient time to take effective precautionary action. *Morgan v. Toomey*, 719 S.W.2d 129 (Mo.App. E.D. 1986).

Submission of jury instruction on failure to keep careful lookout must be supported by substantial evidence from which a jury could find that the allegedly negligent party could have seen the other vehicle or person in time to have taken effective precautionary action if the party had exercised the highest degree of care in keeping a lookout. *Lewis v. State Sec. Ins. Co.*, 718 S.W.2d 539 (Mo.App. E.D. 1986).

Trial court committed reversible error in its submission of instruction on contributory negligence of westbound driver, where driver had no duty to look for westbound traffic in eastbound lanes and driver of car that injured her provided no direct evidence that he had seen her in time to avoid collision, nor did he prove it circumstantially, providing nothing more than speculative deductions. *Finninger v. Johnson*, 692 S.W.2d 390 (Mo.App. E.D. 1985).

Evidence warranted plaintiff's submission of defendant's driver's failure to keep a lookout. *Williams v. M.C. Slater, Inc.*, 590 S.W.2d 357 (Mo.App. E.D. 1979).

Evidence supported lookout submission against driver who drove on wrong side of the road. *Leonard v. Gordon's Transp., Inc.*, 575 S.W.2d 244 (Mo.App. 1978).

Evidence supported defendant's contributory negligence instruction on (a) rear-end collision, (b) failure to keep a lookout, and (c) following too closely. *Pitezel v. Danielson*, 571 S.W.2d 694 (Mo.App. 1978).

Evidence supported each element of verdict director based on failure to yield right-of-way, lookout and excessive speed. *Yust v. Link*, 569 S.W.2d 236 (Mo.App. 1978).

Verdict director submitting three assignments of negligence erroneous where evidence supported only two submissions. *Bunch v. McMillian*, 568 S.W.2d 809 (Mo.App. 1978).

Failure to see that which is visible, standing alone, is insufficient to warrant MAI 17. 05; there must be evidence driver could have taken timely evasive action. *Butler v. Hicks*, 554 S.W.2d 449 (Mo.App. 1977).

Plaintiff pedestrian testified he was standing near the highway's edge when defendant motorist struck him; defendant testified she did not see plaintiff until he ran onto the highway into her path. Trial court erred in refusing plaintiff's lookout instruction. Plaintiff was not required to negate defendant's version, which defendant could have submitted that by a third-method converse. *Williams v. Christian*, 520 S.W.2d 139 (Mo.App. 1974).

Defendant's failure to see stop light at intersection warranted giving instruction on failure to keep a careful lookout. *Rakestraw v. Norris*, 478 S.W.2d 409 (Mo.App. 1972).

Circumstantial evidence may suffice to submit failure to keep a careful lookout. *Watterson v. Portas*, 466 S.W.2d 129 (Mo.App. 1971).

Lookout submission must be supported by evidence that driver could have seen the object in time to have taken effective preventive action. *Corbin v. Wennerberg*, 459 S.W.2d 505 (Mo.App. 1970).

In an intersection collision case, plaintiff's lookout submission was adequately supported by evidence that by keeping a careful lookout, the left-turning defendant could have seen plaintiff in the intersection before striking him; this despite defendant's testimony that he was watching plaintiff at all times. *Rickard v. Pratt*, 459 S.W.2d 13 (Mo.App. 1970).

Error to submit MAI 17.05 (failure to keep a lookout) without evidence that driver in the exercise of the highest degree of care could have seen the object sooner than he did. *Hawkeye-Sec. Ins. Co. v. Thomas Grain Fumigant Co.*, 407 S.W.2d 622 (Mo.App. 1966).

3. Proximate cause

Even where evidence showed driver failed to look before entering blind intersection, it was error to give MAI 17.05 absent evidence that had driver kept a lookout, he could have taken effective action to avoid the collision. *Heberer v. Duncan*, 449 S.W.2d 561 (Mo.banc 1970).

A lookout submission actually submits failure to see and failure to avoid injury by any means supported by the evidence. Thus, plaintiff may argue defendant's failure to look and his failure to swerve and sound a horn even when those elements are not submitted by plaintiff's verdict director. *Lovelace v. Reed*, 486 S.W.2d 417 (Mo. 1972).

For a lookout submission to be proper, substantial evidence must show that the breach of motorist's duty to keep a proper lookout was the proximate cause of the accident. *Wiskur v. Johnson*, 156 S.W.3d 477 (Mo.App. S.D. 2005).

Failure to see that which is visible, standing alone, is insufficient to warrant MAI 17.05; there must be evidence driver could have taken timely evasive action. *Butler v. Hicks*, 554 S.W.2d 449 (Mo.App. 1977).

Plaintiff pedestrian testified he was standing near the highway's edge when defendant motorist struck him; defendant testified she did not see plaintiff until he ran onto the highway into her path. Trial court erred in refusing plaintiff's lookout instruction. Plaintiff was not required to negate defendant's version, which defendant could have submitted that by a third-method converse. *Williams v. Christian*, 520 S.W.2d 139 (Mo.App. 1974).

Failure to keep a proper lookout may be shown circumstantially but MAI 17.05 proper only when failure to keep lookout is shown to be proximate cause of collision. *Bolhofner v. Jones*, 482 S.W.2d 80 (Mo.App. 1972).

Error to submit driving on wrong side of the road or failure to keep a lookout where evidence failed to show causal connection between failure to keep a lookout and the collision. *Shelton v. Bruner*, 449 S.W.2d 673 (Mo.App. 1969).

Submission on failure to keep a lookout was erroneous absent evidence of proximate cause that looking could have prevented collision. *Stegall v. Wilson*, 416 S.W.2d 658 (Mo.App. 1967).

To support an MAI 17.05 lookout submission, evidence must show failure to keep a lookout was proximate cause of plaintiff's injury. *Janicke v. Hough*, 400 S.W.2d 645 (Mo.App. 1966).

4. Lookout and slackening

Error to submit MAI 17.04 (slackening speed) without requiring finding of apparent danger, even when combined with MAI 17.05 (failure to keep a lookout), which does not require that element. *Hawkeye-Sec. Ins. Co. v. Thomas Grain Fumigant Co.*, 407 S.W.2d 622 (Mo.App. 1966).

5. Negligence defined

Failure to define "negligence" in lookout submission was reversible error. *Rakestraw v. Norris*, 478 S.W.2d 409 (Mo.App. 1972).

17.06 [1965 New] Failure to Signal Intention to Turn

Defendant failed to signal an intention to turn.

Notes on Use (1990 Revision)

This is an optional submission of negligence that may be used as paragraph First of Verdict Directing 17.01 or as one of the alternate submissions in paragraph First of Verdict Directing 17.02. It may also be used as a submission in wrongful death cases, see MAI 20.01 and 20.02; and in comparative fault submissions, see MAI 37.02.

Committee Comment (1965 New)

A. Section 304.019, RSMo, provides in part:

> No person shall stop or suddenly decrease the speed of or turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein.

B. Of related significance is § 304.016.4(2), RSMo, which provides in substance that vehicles shall not be driven to the left side of the highway when approaching within one hundred feet of or at any intersection or railroad grade crossing.

C. In *Ilgenfritz v. Quinn*, 318 S.W.2d 186, 188 (Mo. 1958), defendant failed to signal his intent to turn right into a private driveway. He defended on the basis that the hand signal would not have been visible as it was dark. *Id.* at 189. The court held the duty to signal remained. *Id.* at 190. See also *Highfill v. Brown*, 320 S.W.2d 493, 495 (Mo. 1959), where defendant failed to signal his intent to turn left from the highway into a private driveway. The court held that the point where the driveway intersected the highway was not an "intersection" within the meaning of § 304.016.4(2), RSMo. *Id.*

D. Failing to signal was asserted as contributory negligence in *Grantham v. Herod*, 320 S.W.2d 536, 540 (Mo. 1959).

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1. In general

When turning is disputed MAI 17.06 should [be amended to] require submission that there *was a turn. Welch v. Hyatt*, 578 S.W.2d 905 (Mo.banc 1979).

In rear-end case, defendant's evidence that plaintiff slowed and swerved slightly to his left warranted defendant's contributory negligence instruction that plaintiff "failed to signal his intention to turn left." *Welch v. Hyatt*, 578 S.W.2d 905 (Mo.banc 1979).

Defendant's contributory negligence instruction (MAI 28.01, modified by 32.01) submitting plaintiff's failure to keep a lookout or failure to signal. *Lands v. Boyster*, 417 S.W.2d 942, 944 (Mo. 1967).

17.07 [2000 Withdrawn] Failure to Sound Horn

17.08 [1965 New] Failure to Yield Right-of-Way

Defendant failed to yield the right-of-way.

Notes on Use (1965 New)

This is an optional submission of negligence that may be used as paragraph First of Verdict Directing 17.01 or as one of the alternate submissions in paragraph First of Verdict Directing 17.02. It may also be used as a submission in comparative fault (MAI 37.02) and wrongful death cases (MAI 20.01 and 20.02).

The appropriate right-of-way definition must be used in conjunction with this submission. See Chapter 14.

Committee Comment (1996 Revision)

A. See General Comment at MAI 14.01 and Definitions MAI 14.02 to 14.09.

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1. In general

Comparative fault instruction concerning driver's failure to yield right of way was erroneously given in action by estate of deceased driver whose vehicle had struck tow truck parked on highway; driver could not fail to yield right of way to parked vehicle. *Austin v. Kruse*, 874 S.W.2d 454 (Mo.App. W.D. 1994).

Plaintiff submitting failure to yield right-of-way must submit proper definition and may not complain of court's or defendant's failure to do so. *Howe v. Bowman*, 429 S.W.2d 339 (Mo.App. 1968).

2. Definition

MAI 14.02 is for the statutory right-of-way on public roads, not a private parking lot; in that latter case, common law right-of-way is based on duty of reasonable care, not the highest degree of care. *Doolin v. Swain*, 524 S.W.2d 877 (Mo.banc 1975).

Error to give MAI 14.02 in case where plaintiff was struck at intersection controlled by a flashing red light. *Riley v. Bi-State Transit Sys.*, 459 S.W.2d 753 (Mo.App. 1970).

3. Evidentiary support

Evidence supported each element of verdict director based on failure to yield right-of-way, lookout and excessive speed. *Yust v. Link*, 569 S.W.2d 236 (Mo.App. 1978).

17.09 [1965 New] Following Too Closely

Defendant was following the *(insert brief description of car followed)* car too closely.

Notes on Use (1990 Revision)

This is an optional submission of negligence that may be used as paragraph First of Verdict Directing 17.01 or as one of the alternate submissions in paragraph First of Verdict Directing 17.02. It may also be used as a submission in comparative fault cases (MAI 37.02) and wrongful death cases (MAI 20.01 and 20.02).

Committee Comment (1996 Revision)

A. Section 304.044, RSMo, provides that trucks and buses shall not follow within 300 feet of other trucks or buses.

B. Hypothesizing failure of defendant to maintain this distance, negligence, causation and injury, is the proper basis for a verdict directing instruction. See *Thebeau v. Thebeau*, 324 S.W.2d 674, 678 (Mo.banc 1959). There the court said:

> [T]he main purpose of section 304.044 was . . . to provide sufficient space between trucks and busses to permit lighter vehicles to pass, but we are not persuaded that this was its only purpose. We think it obvious that as a traffic safety regulation it was also intended for the protection of forward trucks and those trucks following, as well as the drivers and passengers therein.

C. Section 304.017, RSMo, provides in part:

> The driver of a vehicle shall not follow another vehicle more closely than is reasonably safe and prudent, having due regard for the speed of such vehicle and the traffic upon and the condition of the roadway.

D. In *Binion v. Armentrout*, 333 S.W.2d 87, 88 (Mo. 1960), plaintiff was injured while changing a tire along a highway. The car ahead of defendant's car saw plaintiff, swerved, and missed him. *Id.* at 89. Plaintiff argued that defendant was unable to do the same as he was following the front car too closely. *Id.* at 89–90. Defendant contended that the statute was not designed to protect against this kind of injury and thus plaintiff could not recover simply because defendant violated the statute. *Id.* at 90. The court said:

> We see no reasonable basis for that position. Could it be reasonably said that the statute was designed for the sole protection of the forward vehicle or vehicles following, or parked

> vehicles, or a passing vehicle (and occupants of said vehicles), or pedestrians? We have concluded that said section was enacted for the protection of every person or vehicle which would reasonably be afforded a measure of protection by the enforcement of the terms thereof.

Id. at 90.

E. Where the facts bring plaintiff's case within the "rear end collision" doctrine, plaintiff may prefer to use MAI 17.16.

F. Following too closely was submitted as contributory negligence in *Terrell v. McKnight*, 360 Mo. 19, 26, 226 S.W.2d 714, 717 (1950). See MAI 37.02 for submission of comparative fault.

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1. In general

Error to submit MAI 17.09 when evidence did not show a causal connection between the act of following too closely and the collision. *Pyles v. Roth*, 421 S.W.2d 261 (Mo. 1967).

2. Evidentiary support

Evidence supported defendant's contributory negligence instruction on (a) rear end collision, (b) failure to keep a lookout, and (c) following too closely. *Pitezel v. Danielson*, 571 S.W.2d 694 (Mo.App. 1978).

17.10 [1965 New] Passing on the Right

Defendant passed the *(insert brief description of car passed)* car on the right.

Notes on Use (1990 Revision)

This is an optional submission of negligence that may be used as paragraph First of Verdict Directing 17.01 or as one of the alternate submissions in paragraph First of Verdict Directing 17.02. It may also be used as a submission in comparative fault cases (MAI 37.02) and wrongful death cases (MAI 20.01 and 20.02).

Committee Comment (1996 Revision)

A. Section 304.016.1(1), RSMo, provides in part:

> The driver of a vehicle overtaking another vehicle proceeding in the same direction shall pass to the left thereof at a safe distance and shall not again drive to the right side of the roadway until safely clear of the overtaken vehicle[.]

B. Section 304.016.2, RSMo, provides in part these exceptions:

> The driver of a motor vehicle may overtake and pass to the right of another vehicle only under the following conditions:
>
> (1) When the vehicle overtaken is making or about to make a left turn;
>
> (2) Upon a city street with unobstructed pavement of sufficient width for two or more lines of vehicles in each direction;
>
> (3) Upon a one-way street;
>
> (4) Upon any highway outside of a city with unobstructed pavement of sufficient width and clearly marked for four or more lines of traffic. . . .

C. In *Willhite v. City of St. Louis*, 359 Mo. 933, 936, 224 S.W.2d 956, 957 (1949), the court said, "we cannot hold that it is always negligence as a matter of law, under all circumstances, to pass another vehicle on the right; although usually it is."

D. The statute has been modified slightly since this decision.

E. See also *Sisk v. Driggers*, 364 S.W.2d 76, 79 (Mo.App. 1962), where the jury was instructed that passing on the right was negligent.

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1. In general

Comparative fault instruction charging plaintiff with negligence in passing on the right was erroneous since such action was permitted on four lane highway in question. *Varner v. Weiss*, 887 S.W.2d 659 (Mo.App. E.D. 1994).

17.11 [1965 New] Slowing Without Adequate Warning

Defendant suddenly slowed defendant's automobile on the highway without first giving an adequate and timely warning of defendant's intention to slow.

Notes on Use (1965 New)

This is an optional submission of negligence that may be used as paragraph First of MAI 17.01 or as one of the alternate submissions in paragraph First of MAI 17.02. It may also be used as a submission in comparative fault cases (MAI 37.02) and wrongful death cases (MAI 20.01 and 20.02).

Committee Comment (1965 New)

A. See Committee Comment following MAI 17.12.

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1. Pleading

MAI 17.11 submitting "suddenly slowed his automobile" was not beyond pleadings alleging driver made a "sudden and abrupt stop." *Boland v. Jando*, 414 S.W.2d 560 (Mo. 1967).

2. Deviation

When there was no evidence plaintiffs failed to give a warning signal, defendant's contributory negligence instruction, combining MAI 32.01 with modifications of MAI 17.11 (slowing without adequate warning) and MAI 17.12 (stopping without adequate warning), was erroneous for substituting the words "at a time when it was not reasonably safe to do so." *Burton v. Bi-State Dev. Agency*, 468 S.W.2d 4 (Mo. 1971).

Omission of "suddenly" in MAI 17.11 is error. *Koehler v. Schott*, 426 S.W.2d 677 (Mo.App. 1968).

3. Evidentiary support

Error to give MAI 28.01 [Now 32.01]–17.11 as contributory negligence instruction where (1) defendant was vague about whether plaintiff's brake lights did go on, and (2) defendant was not looking and would not have seen the lights if they were on. *Brassfield v. Sears*, 421 S.W.2d 321 (Mo. 1967).

Evidence in negligence suit against preceding driver arising from rear-end collision was sufficient to go to jury on question of whether there was causal connection between preceding driver's alleged failure to signal intention to stop or slow down and damages sustained by passenger in following vehicle; evidence included proof that preceding driver observed stopped vehicle one quarter of a mile ahead, permitting jury to find that his failure to negotiate more gradual and controlled stop, thereby earlier activating the brake lights on his vehicle, proximately caused passenger's injury. *Hawthorne v. Hills*, 861 S.W.2d 337 (Mo.App. W.D. 1993).

17.12 [1965 New] Stopping Without Adequate Warning

Defendant suddenly stopped defendant's automobile on the highway without first giving an adequate and timely warning of defendant's intention to stop.

Notes on Use (1990 Revision)

This is an optional submission of negligence that may be used as paragraph First of Verdict Directing 17.01 or as one of the alternate submissions in paragraph First of Verdict Directing 17.02. It may also be used as a submission in comparative fault cases (MAI 37.02) and wrongful death cases (MAI 20.01 and 20.02).

Committee Comment (1996 Revision)

A. Section 304.019, RSMo, provides in part:

> No person shall stop or suddenly decrease the speed of or turn a vehicle from a direct course or move right or left upon a roadway unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein.

B. In *Matthews v. Mound City Cab Co.*, 205 S.W.2d 243, 247–48 (Mo.App. 1947), the court said (in construing the predecessor of the present statute):

> The defendant is in one sense correct when it says that a signal given by the electrical signaling device at the rear of the cab was all that was required by law . . ..
>
> But while a signal given by a statutory electrical signaling device is sufficient as regards the manner or form which the signaling shall take, the circumstances under which such a signal is given may nevertheless be such as to preclude the particular signal from constituting reasonable or adequate warning. For example, in the case of a sudden and abrupt stop, the flash of a signal during the fleeting moment of time within which a front vehicle is brought to a stop may well be insufficient . . ..
>
> This is not to imply that every sudden and abrupt stop of an automobile is in and of itself proof of negligence, but only that such a stop will constitute negligence if there is no emergency shown to justify it, and it is made in disregard of the presence of vehicles following so closely behind that they may be unable to avoid a collision.

C. See also *White v. Rohrer*, 267 S.W.2d 31, 35–36 (Mo. 1954), holding that no further definition of "timely" or "adequate" is required.

D. In *Terrell v. McKnight*, 360 Mo. 19, 24, 226 S.W.2d 714, 716 (1950), the court held that failing to signal a stop is not negligence if "considering the distance between [defendant's] vehicle and that of plaintiff, the speed at which plaintiff was driving and the condition of the highway as to other traffic, he could reasonably believe he could stop without colliding with plaintiff's car."

E. See also *Lafferty v. Wattle*, 349 S.W.2d 519 (Mo.App. 1961). In *Pilkenton v. Fegley*, 321 S.W.2d 435, 438 (Mo. 1959), the court cited two earlier cases that said:

> "There is nothing in this statute to justify a *sudden stopping*, that is one without timely warning. It is well settled that the driver of a forward car in making a sudden stop of this kind must give a warning to a car closely following [*Ritz v. Cousins Lumber Co.*, 227 Mo.App. 1167, 59 S.W.2d 1072, 1075 (1933)] . . .. The test of sufficiency of the warning by a motorist that he is about to stop is whether the warning is adequate and timely." [*Thaller v. Skinner & Kennedy Co.*, 315 S.W.2d 124, 130 (Mo.banc 1958)].

F. "[T]he sudden slowing of an automobile is not negligence unless the driver shall fail to give a reasonably adequate and timely warning of his intention to do so." *Tucker v. Blankenmeier*, 315 S.W.2d 724, 727 (Mo. 1958).

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1. In general

Verdict director submitting negligent application of brakes causing skid (pre *Friederich v. Chamberlain*, 458 S.W.2d 360 (Mo.banc 1970)). *Middleman v. Complete Auto Transit, Inc.*, 486 S.W.2d 456 (Mo.banc 1972).

Error to submit that defendant motorist stopped on the traveled portion of the highway since it omitted the elements of suddenly stopping without warning. (Given before adoption of MAI 17.20). *Joly v. Wippler*, 449 S.W.2d 565 (Mo. 1970).

Defendant's MAI 28.01 [Now 32.01]–17.05 to 17.12 (contributory negligence involving lookout and sudden stop) proper in form, but erroneous where there was no evidence that plaintiff's stop was sudden. *Markle v. Fallek*, 424 S.W.2d 756 (Mo.App. 1968).

2. Evidentiary support

When there was no evidence plaintiffs failed to give a warning signal, defendant's contributory negligence instruction, combining MAI 32.01 with modifications of MAI 17.11 (slowing without adequate warning) and MAI 17.12 (stopping without adequate warning) was erroneous for substituting the words "at a time when it was not reasonably safe to do so." *Burton v. Bi-State Dev. Agency*, 468 S.W.2d 4 (Mo. 1971).

Evidence must show a causal connection between negligent act and injury; where plaintiff-driver knew approaching school bus was going to stop, driver improperly submitted negligence of approaching bus driver in thereafter giving another belated signal to stop. *Pruneau v. Cain*, 458 S.W.2d 265 (Mo. 1970).

Evidence in rear-end automobile collision suit against preceding driver was sufficient to submit to jury issue of whether preceding driver suddenly stopped vehicle or suddenly slowed vehicle without first giving adequate and timely warning, even if preceding driver proved that brake lights on his vehicle worked properly when activated. *Hawthorne v. Hills*, 861 S.W.2d 337 (Mo.App. W.D. 1993).

3. Adequate warning

Where plaintiffs' evidence supported both MAI 17.20, defendant stopping on highway, and MAI 17.12, defendant stopping without adequate warning, plaintiffs are entitled to choose their own theory of recovery and the court did not err in giving MAI 17.20 rather than MAI 17.12 as contended by defendant. *Certa v. Associated Bldg. Ctr., Inc.*, 560 S.W.2d 593 (Mo.App. 1977).

Where rear-ended plaintiff had adequate warning that preceding car was going to slow down and turn but suddenly braked and stopped without signaling, her contributory negligence was properly submitted by MAI 32.01–17.12. *Schoessel v. Robertson*, 480 S.W.2d 95 (Mo.App. 1972).

17.13 [1978 Revision] Wrong Side of the Road

Defendant's automobile was on the wrong side of the road.

Notes on Use (1990 Revision)

This is an optional submission of negligence which may be used as paragraph First of Verdict Directing 17.01 or as one of the alternate submissions in paragraph First of Verdict Directing 17.02. It may also be used as a submission in comparative negligence and wrongful death cases.

This instruction is applicable both where the collision occurs on the wrong side of the road and where the collision occurs with the defendant on the correct side of the road but is caused by the defendant having driven on the wrong side of the road. This is the applicable instruction in both skidding and non-skidding cases.

Committee Comment (1978 Revision)

A. The law regarding the effect of skidding evidence in a case involving a motor vehicle accident on the wrong side of the road has been substantially revised by *Friederich v. Chamberlain*, 458 S.W.2d 360 (Mo.banc 1970). If the evidence shows that defendant is on the wrong side of the road, plaintiff is entitled to go to the jury. Skidding is a circumstance which the jury can consider in connection with all other facts and circumstances in deciding whether defendant was negligent.

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In a head-on collision case where the only evidence defendant skidded across the center line came in defendant's case, the plaintiff's verdict director properly based defendant's liability on driving on the wrong side of the road, without reference to defendant's skidding since that was merely defensive evidence of no negligence. *Turner v. Cowart*, 450 S.W.2d 441 (Mo. 1969).

Where driver is lawfully making a left turn, it is error to give a verdict director against him for driving on the wrong side of the road. *Ellison v. Simmons*, 447 S.W.2d 66 (Mo. 1969).

Where plaintiff's evidence showed defendant *skidded* onto wrong side of road, error to submit defendant *drove* onto wrong side of road. *McIntyre v. Whited*, 440 S.W.2d 449 (Mo. 1969).

MAI 17.13 submitting that defendant *drove* on wrong side of the road was not supported by evidence that he *skidded* across center line. *Strickland v. Barker*, 436 S.W.2d 37 (Mo. 1969).

Evidence supported lookout submission against driver who drove on wrong side of the road. *Leonard v. Gordon's Transp., Inc.*, 575 S.W.2d 244 (Mo.App. 1978).

Rule of the road (§ 304.015(2), RSMo) regarding driving on the right side of the road makes exceptions, such as overtaking, but without evidence thereof, verdict director need not negate the exceptions. *Leonard v. Gordon's Transp., Inc.*, 575 S.W.2d 244 (Mo.App. 1978).

MAI 17.13 proper where defendant crossed center line and then returned to right side into collision with plaintiff. *Cryts v. Ford Motor Co.*, 571 S.W.2d 683 (Mo.App. 1978).

Old MAI 17.13 is still proper, as a not-in-MAI verdict director, for northbound motorist who drove into southbound lane to avoid a weaving southbound motorist. New MAI 17.13 would not have been proper since southbound motorist was not on the wrong side of the road *at the time of the collision*. *McCroskey v. Marshall*, 519 S.W.2d 717 (Mo.App. 1975).

When evidence showed the sole factual cause of collision was defendant's skidding across the center line, it was error for plaintiff to submit MAI 17.13 (*Driving* on the Wrong Side of the Road). *Jokisch v. Life & Cas. Ins. Co. of Tenn.*, 424 S.W.2d 111 (Mo.App. 1967).

2. Negligence per se

In personal injury action involving wrong side of the road case, it was reversible error to submit verdict directing instruction that withheld element of negligence from consideration where negligence per se theory of liability was not tried by consent; even though driver's guilty plea to traffic violation was admissible, submission of instruction based on negligence per se was improper where driver did not plead a statutory violation or negligence per se theory of liability. *Myers v. Morrison*, 822 S.W.2d 906 (Mo.App. E.D. 1991).

Driving on wrong side of road is negligence per se and "negligence" need not be hypothesized. *Bentley v. Crews*, 630 S.W.2d 99 (Mo.App. E.D. 1981).

Where defendant's car *skidded* off the wrong side of the highway, plaintiff was entitled to a res ipsa verdict director. *Silver v. Curtis*, 490 S.W.2d 412 (Mo.App. 1972).

Plaintiff's verdict-directing instruction properly omitted submission of *negligence* where evidence showed defendant failed to drive as close as *practical* to right-hand edge of the highway. *Condos v. Associated Transps., Inc.*, 453 S.W.2d 682 (Mo.App. 1970).

3. Negating defense

MAI 17.13 proper and need not negate purely defensive evidence that there was no collision. *State Farm Mut. Auto. Ins. Co. v. Jessee*, 523 S.W.2d 832 (Mo.App. 1975).

4. Skidding

Where defendant drove off the roadway, struck a culvert and then veered back onto the roadway, and struck plaintiff on wrong side of the road, plaintiff's case should have been submitted by MAI 17.13, wrong side of the road, rather than by MAI 31.02(1), res ipsa loquitur. *Dwyer v. Moss*, 462 S.W.2d 645 (Mo.banc 1971).

Where plaintiff properly submitted MAI 17.13, driving on wrong side of the road, and defendant testified she skidded across the center line, it was error to give defendant's affirmative defense instruction exonerating her if she skidded. (This would have been error even had defendant further submitted that her skidding was not negligent.) Such an instruction is akin to an accident instruction condemned by MAI 1.01 and a sole-cause instruction condemned by MAI 1.03. Defendant should be limited to conversing negligence by MAI 33.02(2), and then arguing non-negligent skidding. *Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970).

Verdict director submitting negligent application of brakes causing skid. (*Friederich v. Chamberlain*, 458 S.W.2d 360 (Mo.banc 1970)). *Middleman v. Complete Auto Transit, Inc.*, 486 S.W.2d 456 (Mo.banc 1972).

Where the evidence, either plaintiff's or defendant's, shows that defendant's car skidded onto the wrong side of the road into collision with plaintiff's car the plaintiff has made a submissible case of defendant's negligence in driving onto the wrong side of the road; thereupon the burden of evidence is upon the defendant to excuse the presence of his vehicle on the wrong side of the road. *Friederich v. Chamberlain*, 458 S.W.2d 360 (Mo.banc 1970).

Where defendant's car *skidded* off the wrong side of the highway, plaintiff was entitled to a res ipsa verdict director. *Silver v. Curtis*, 490 S.W.2d 412 (Mo.App. 1972).

5. Wrong side of road

Revised MAI 17.13 is to be used in all appropriate wrong-side-of-the-road cases. But where defendant was initially driving on the wrong side of the road and thereby forced plaintiff to move onto plaintiff's wrong side of the road and the collision occurred there, new MAI 17.13 was inappropriate since defendant was not on the wrong side of the road at the time of the collision, and plaintiff properly submitted that defendant negligently drove on the wrong side of the road. *Pittock v. Gardner*, 530 S.W.2d 217 (Mo.banc 1975).

Driving on wrong side of road is negligence per se and "negligence" need not be hypothesized. *Bentley v. Crews*, 630 S.W.2d 99 (Mo.App. E.D. 1981).

MAI 17.13 proper where defendant crossed center line and then returned to right side into collision with plaintiff. *Cryts v. Ford Motor Co.*, 571 S.W.2d 683 (Mo.App. 1978).

6. Backing

Where defendant's grader was being backed on the right-hand side of the road, it was improper for plaintiff to submit driving on the wrong side of the road. *Bounds v. Scott Constr. Co.*, 498 S.W.2d 765 (Mo. 1973).

17.14 [1990 Withdrawn] Humanitarian Negligence, Compound

17.15 [1990 Withdrawn] Humanitarian Negligence, Disjunctive

17.16 [1973 Revision] Rear End Collision

Your verdict must be for plaintiff if you believe:

First, defendant's automobile came into collision with the rear of plaintiff's automobile, and

Second, defendant was thereby negligent,[1] and

Third, as a direct result of such negligence,[1] plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1990 Revision)

1. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

The rear end doctrine is limited in scope and this instruction should not be used except where the facts show the doctrine is clearly applicable.

* Add if affirmative defense is submitted. This bracketed phrase should not be used to submit comparative fault.

Committee Comment (1990 Revision)

A. For modification of verdict directing instructions to submit comparative fault, see MAI 37.01.

B. This is the instruction to use in rear-end cases such as *Jones v. Central States Oil Co.*, 350 Mo. 91, 164 S.W.2d 914 (1942), and other such cases.

C. Paragraph Second must be included.

D. Where agency is in issue, see MAI 18.01.

E. Where suit involves multiple causes of damage, see MAI 19.01.

F. Where suit is for wrongful death, see MAI 20.01 and 20.02.

G. Where suit is for loss of services or medical expenses of dependent, see MAI 31.04.

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It was error to submit an instruction based on the rear-end collision doctrine in a case in which the defendant slid down an icy hill where defendant had neither time nor distance to stop after observing the vehicles ahead of her. *Kaufmann by Kaufmann v. Nagle*, 807 S.W.2d 91 (Mo.banc 1991).

Rear-end submission proper where defendant rear-ended plaintiff's car while parked off the paved portion of the highway. *Barlow v. Thornhill*, 537 S.W.2d 412 (Mo.banc 1976).

Where plaintiff was struck from behind by moving hand truck, her not-in-MAI verdict director was akin to MAI 17.16 (rear-end collision). *Scheele v. Am. Bakeries Co.*, 427 S.W.2d 361, 362 (Mo. 1968).

Motorist was prejudiced by trial court's refusal to instruct jury under the rear-end collision doctrine. *Wampler v. Speake*, 479 S.W.3d 771 (Mo.App. S.D. 2016).

Motorist's claim that trial court erred in refusing to instruct the jury under the rear-end collision verdict director and by instead giving verdict director based on a combination of multiple negligent acts submitted and failure to act after danger of collision was apparent was preserved for appeal in motorist's negligence action against driver who rear-ended motorist's vehicle, given that motorist objected to the content of the instruction, both when submitted and in her motion for new trial. *Clark v. Belfonte Distrib., Inc.*, 163 S.W.3d 581 (Mo.App. W.D. 2005).

Non-standard verdict director modeled after rear-end collision verdict director properly stated the law in negligence action based on automobile accident that occurred when driver collided with parked van after misjudging its position; driver admitted seeing van before he began moving his car, such that ultimate fact for the jury to decide was whether driver's operation of his car was negligent. *Wiskur v. Johnson*, 156 S.W.3d 477 (Mo.App. S.D. 2005).

Jury question existed on crossclaim by driver against construction company as to whether construction company flagger, inappropriately dressed, negligently stopped vehicles suddenly and without adequate warning and was a partial cause of rear end collision. Trial court erroneously directed verdict on crossclaim in favor of construction company. Trial court properly submitted rear end doctrine against offending truck driver despite the fact that the accident took place in a construction zone. *Donham v. Samo*, 838 S.W.2d 174 (Mo.App. W.D. 1992).

Jury instruction submitting as ground of negligence that driver of rear-ended car had "failed to keep proper control of her vehicle" was prejudicially erroneous in driver's action against driver of car that rear ended her. *Havel v. Diebler*, 836 S.W.2d 501 (Mo.App. W.D. 1992).

In an action brought by passenger in lead automobile against driver of following automobile to recover injuries sustained in rear-end collision, negligence on the part of the driver of the lead automobile did not preclude passenger from obtaining rear-end collision doctrine instruction. *Wegeng v. Flowers*, 753 S.W.2d 306, 309 (Mo.App. W.D. 1988).

Submission of rear-end instruction was reversible error where testimony was that truck's taillight was out and the other light was very dim and the truck was improperly parked. *Jensen v. Pappas*, 684 S.W.2d 524 (Mo.App. S.D. 1984).

Where Kansas law of the rear-end doctrine was substantively akin to Missouri law, MAI 17.16, not Kansas pattern instruction, should be given. *Warriner v. Eblovi*, 485 S.W.2d 700 (Mo.App. 1972).

Error to submit plaintiff's verdict director under rear-end doctrine absent substantial evidence that defendant struck plaintiff's car in *rear. Neil v. Mayer*, 426 S.W.2d 711 (Mo.App. 1968).

2. Evidentiary support

Jury verdict for motorist who struck second motorist from behind was supported by probative evidence where evidence existed from which jury could have found following motorist was using highest degree of care and second motorist's sudden complete stop in fast lane was not reasonably foreseeable to driver exercising highest degree of care. *Nishwitz v. Blosser*, 850 S.W.2d 119 (Mo.App. E.D. 1993).

Evidence supported defendant's contributory negligence instruction on (a) rear-end collision, (b) failure to keep a lookout, and (c) following too closely. *Pitezel v. Danielson*, 571 S.W.2d 694 (Mo.App. 1978).

Evidence that defendant turned into plaintiff's lane, drove 100 feet and then struck plaintiff's stopped car warranted submission of rear-end instruction. *Becker v. Finke*, 567 S.W.2d 136 (Mo.App. 1978).

Plaintiff and defendant drivers were halted in tandem for a left turn when a third car rear-ended defendant, shoving defendant's car into plaintiff's; since defendant did not "permit" his car to strike plaintiff's, the rear-end doctrine did not apply. *Cosens v. Smith*, 528 S.W.2d 772 (Mo.App. 1975).

Where leading car turned sharply into path of overtaking car, which had only 60 feet in distance and three seconds in time to avoid collision, the rear-end doctrine did not apply since adequate time and distance available to overtaking driver are essential elements of his liability. *Lichtenberg v. Hug*, 481 S.W.2d 527 (Mo.App. 1972).

Evidence that plaintiff was traveling in proper lane when struck by defendant from the rear was sufficient to warrant submission under rear-end doctrine. *Gaynor v. Horwitz*, 464 S.W.2d 537 (Mo.App. 1971).

3. Harmless error

Giving old version of MAI 17.16 after new MAI 17.16 became effective was error but harmless because it required higher proof of negligence. *Coffer v. Paris*, 550 S.W.2d 915 (Mo.App. 1977).

4. Contributory negligence

Rear-end instruction may be used by defendant driver to submit *contributory negligence* of plaintiff-driver of following car. *Mueller v. Storbakken*, 583 S.W.2d 179 (Mo.banc 1979).

17.17 [1978 Revision] Per se Negligence—Improper Turn

Your verdict must be for plaintiff if you believe:

First, defendant in approaching the intersection intending to turn left failed to drive defendant's automobile in the portion of the right half of the roadway nearest the center line, and

Second, as a direct result of such conduct, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (2015 Revision)

Although the violation of a traffic statute or ordinance may be negligence per se (*Rowe v. Kansas City Pub. Serv. Co.*, 248 S.W.2d 445, 448 (Mo.App. 1952)), "[u]nder the circumstances of a particular case there may be a valid excuse for failing to comply with a statutory rule of the road, as where nonobservance of the statute is induced by considerations of safety . . . or where compliance is impossible . . . ." *MacArthur v. Gendron*, 312 S.W.2d 146, 150 (Mo.App. 1958).

*Add if affirmative defense is submitted. This bracketed phrase should not be used to submit comparative fault.

An affirmative converse instruction should not be used to submit in the affirmative the same issue as has already been submitted in the verdict directing instruction. See *Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970); *Oliver v. Bi-State Dev. Agency*, 494 S.W.2d 49 (Mo. 1973). Use a true converse instruction to converse an element that is submitted by the verdict director.

Caution: Where an affirmative converse instruction is properly submitted, the verdict director must be modified by adding a phrase, commonly referred to as an "affirmative defense" tail, that refers the jury directly from the verdict director to the affirmative converse instruction. No such "tail" is required when a true converse instruction is submitted. See the discussion in MAI 33.01. In *Goudeaux v. Board of Police Commissioners*, 409 S.W.3d 508 (Mo.App. W.D. 2013), the court held that the facts constituting a legal justification or excuse must be pleaded as an affirmative defense and that such a submission does not preclude the submission of negligence per se. *Cf. Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992).

Committee Comment (2012 Revision)

A. For modifications of verdict directing instructions to submit comparative fault, see MAI 37.01.

B. See MAI 33.05(2) to submit legal justification or "excuse" for negligence per se.

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Conversing 2

1. In general

Instruction on negligence per se is still proper where there is evidence of excuse or justification. Excuse or justification is an affirmative defense to negligence per se; it does not transform a submissible negligence per se claim into a negligence claim. *Goudeaux v. Bd. of Police Comm'rs of Kansas City*, 409 S.W.3d 508 (Mo.App. W.D. 2013).

In personal injury action involving wrong side of the road case, it was reversible error to submit verdict directing instruction that withheld element of negligence from consideration where negligence per se theory of liability was not tried by consent; even though driver's guilty plea to traffic violation was admissible, submission of instruction based on negligence per se was improper where driver did not plead a statutory violation or negligence per se theory of liability. *Myers v. Morrison*, 822 S.W.2d 906 (Mo.App. E.D. 1991).

Although emergency instructions are no longer permitted under MAI, defense of justification or excuse remains, and defendant may introduce any evidence which tends to establish he is not guilty of negligence. *Cowell v. Thompson*, 713 S.W.2d 52 (Mo.App. E.D. 1986).

Plaintiff's verdict-directing instruction properly omitted submission of *negligence* where evidence showed defendant failed to drive as close as *practical* to right-hand edge of the highway. *Condos v. Associated Transpts., Inc.*, 453 S.W.2d 682 (Mo.App. 1970).

2. Conversing

Where plaintiff's verdict director does not require finding defendant negligent, it is error to give a converse which directs a finding for defendant if he was not negligent since a converse instruction must be in substantially the same language as the verdict director. The court, however, noted that defendant was entitled to an instruction on justification or excuse, and indicated that the error in defendant's converse instruction would have been avoided if it had been reworded, making it an affirmative converse. *Cowell v. Thompson*, 713 S.W.2d 52 (Mo.App. E.D. 1986).

Where plaintiff's verdict director submitted facts constituting negligence per se and did not require a finding defendant was negligent, it was error to give defendant's converse to find for defendant if he was not negligent as submitted in plaintiff's verdict director. *Oventrop v. Bi-State Dev. Agency*, 521 S.W.2d 488 (Mo.App. 1975).

17.18 [1978 Revision] Per se Negligence—Violating Speed Limit

Your verdict must be for plaintiff if you believe:

First, defendant drove at a speed in excess of *(insert legal maximum)* miles per hour, and

Second, as a direct result of such conduct, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (2015 Revision)

Although the violation of a traffic statute or ordinance may be negligence per se (*Rowe v. Kansas City Pub. Serv. Co.*, 248 S.W.2d 445, 448 (1952)), "[u]nder the circumstances of a particular case there may be a valid excuse for failing to comply with a statutory rule of the road, as where nonobservance of the statute is induced by considerations of safety . . . or where compliance is impossible . . . ." *MacArthur v. Gendron*, 312 S.W.2d 146, 150 (Mo.App. 1958).

*Add if affirmative defense is submitted. This bracketed phrase should not be used to submit comparative fault.

An affirmative converse instruction should not be used to submit in the affirmative the same issue as has already been submitted in the verdict directing instruction. See *Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970); *Oliver v. Bi-State Dev. Agency*, 494 S.W.2d 49 (Mo. 1973). Use a true converse instruction to converse an element that is submitted by the verdict director.

Caution: Where an affirmative converse instruction is properly submitted, the verdict director must be modified by adding a phrase, commonly referred to as an "affirmative defense" tail, that refers the jury directly from the verdict director to the affirmative converse instruction. No such "tail" is required when a true converse instruction is submitted. See the discussion in MAI 33.01. In *Goudeaux v. Board of Police Commissioners*, 409 S.W.3d 508 (Mo.App. W.D. 2013), the court held that the facts constituting a legal justification or excuse must be pleaded as an affirmative defense and that such a submission does not preclude the submission of negligence per se. *Cf. Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992).

Committee Comment (2012 Revision)

A. For modifications of verdict directing instructions to submit comparative fault, see MAI 37.01.

B. See MAI 33.05(2) for submission of legal justification or "excuse" for negligence per se.

Research References

West's Key Number Digest
Automobiles ⚷246(20)

Legal Encyclopedias
C.J.S., Motor Vehicles § 1472

Annotations

In general 1
Conversing 2

1. In general

In personal injury action involving wrong side of the road case, it was reversible error to submit verdict directing instruction that withheld element of negligence from consideration where negligence per se theory of liability was not tried by consent; even though driver's guilty plea to traffic violation was admissible, submission of instruction based on negligence per se was improper where driver did not plead a statutory violation or negligence per se theory of liability. *Myers v. Morrison*, 822 S.W.2d 906 (Mo.App. E.D. 1991).

Although emergency instructions are no longer permitted under MAI, defense of justification or excuse remains, and defendant may introduce any evidence which tends to establish he is not guilty of negligence. *Cowell v. Thompson*, 713 S.W.2d 52 (Mo.App. E.D. 1986).

2. Conversing

Where plaintiff's verdict director does not require finding defendant negligent, it is error to give a converse which directs a finding for defendant if he was not negligent since a converse instruction must be in substantially the same language as the verdict director. The court, however, noted that defendant was entitled to an instruction on justification or excuse, and indicated that the error in defendant's converse instruction would have been avoided if it had been reworded, making it an affirmative converse. *Cowell v. Thompson*, 713 S.W.2d 52 (Mo.App. E.D. 1986).

Where plaintiff submitted failure to use the "highest degree of care," error to give defendant's converse based only on defendant's "negligence." *Doyle v. Bi-State Dev. Agency*, 628 S.W.2d 695 (Mo.App. E.D. 1982).

Where plaintiff's verdict director submitted facts constituting negligence per se and did not require a finding defendant was negligent, it was error to give defendant's converse to find for defendant if he was not negligent as submitted in plaintiff's verdict director. *Oventrop v. Bi-State Dev. Agency*, 521 S.W.2d 488 (Mo.App. 1975).

17.19 [1969 New] Unable to Stop Within Range of Vision

Defendant drove at a speed which made it impossible for defendant to stop within the range of defendant's visibility.

Notes on Use (1990 Revision)

This provision is to be used in lieu of paragraph First of 17.01 or as one of the alternate submissions in paragraph First of 17.02. It may also be used as a submission in comparative fault (MAI 37.02) and wrongful death cases (MAI 20.01 and 20.02).

Committee Comment (1969 New)

A. While Missouri does not have the assured clear distance rule, it does allow jurors to find driving beyond the range of vision to be negligent. The existing instruction on excessive speed does not adequately cover this particular kind of misconduct.

B. In *Johnson v. Lee Way Motor Freight, Inc.*, 261 S.W.2d 95, 96 (Mo. 1953), the plaintiff collided with the rear end of a stationary tractor-trailer owned by defendant, which was stopped on the highway. There were patches of fog along the highway but between the patches there was no limitation of visibility. *Id.* at 97. Plaintiff had just emerged from a patch of fog at a speed of about 40 miles per hour when he saw defendant's truck 30 to 35 feet ahead of him. *Id.* According to plaintiff, the truck had no lights on. *Id.* The court made the following statements:

> "Defendants' contention that plaintiff was guilty of contributory negligence as a matter of law is based upon the asserted proposition that it is always negligence as a matter of law to drive at such a speed that it is impossible to stop within the range of visibility." *Id.*
>
> "We continue to adhere to the view that one is not necessarily contributorily negligent as a matter of law solely because he drives at a speed which prevents his stopping within the distance his headlights reveal objects ahead of him; and that whether he is contributorily negligent as a matter of law depends upon all the circumstances in a particular case." *Id.* at 98.
>
> "We are of the opinion that it was for the jury to decide in this case whether plaintiff was contributorily negligent in failing to so reduce his speed either before entering or upon entering the fog patch to have assured himself that he could stop his automobile within his range of vision." *Id.* at 98.

C. See also *Thompson v. Byers Transp. Co., Inc.*, 362 Mo. 42, 239 S.W.2d 498 (1951), and *Haley v. Edwards*, 276 S.W.2d 153 (Mo. 1955).

Research References

West's Key Number Digest
Automobiles ⚷246(7)

Annotations

1. In general

Gravamen of liability is excessive speed. *Robertson v. Grotheer*, 521 S.W.2d 452 (Mo.App. 1975).

17.20 [1969 New] Stopping in Lane Reserved for Moving Traffic

Defendant stopped defendant's automobile in a lane reserved for moving traffic.

Notes on Use (1969 New)

Caution: Not every such stop is submissible as being a negligent act. The circumstances must be such that a jury could reasonably find the stop was negligent. This provision is to be used in lieu of paragraph First of 17.01 or as one of the alternate submissions in paragraph First of 17.02. This submission may be employed in comparative fault cases (MAI 37.02) and wrongful death cases (MAI 20.01 and 20.02) when applicable.

Committee Comment (1996 Revision)

A. There are occasions when the stop is neither sudden nor unsignaled but still negligent. Failure to pull onto the shoulder in cases of motor or tire trouble or when picking up passengers are typical, particularly when the stop is just past the crest of a hill or at night. Such a submission would, of course, have to be coupled with a finding that the act was negligent. See, e.g., *Lane v. Supreme Cab Co.*, 374 S.W.2d 527 (Mo.App. 1964) and *Lotshaw v. Vaughn*, 381 S.W.2d 43 (Mo.App. 1964).

Research References

West's Key Number Digest
Automobiles ⚷246(7)

Annotations

In general 1
Parking on shoulder 2

1. In general

Verdict director on allowing stalled truck to remain on the highway. *Hofstra v. Schriber*, 475 S.W.2d 44 (Mo. 1972).

Modified verdict director approved. *Hofstra v. Schriber*, 475 S.W.2d 44 (Mo. 1972).

When there was no evidence plaintiffs failed to give a warning signal, defendant's contributory negligence instruction, combining MAI 32.01 with modifications of MAI 17.11 (slowing without adequate warning) and MAI 17.12 (stopping without adequate warning), was erroneous for substituting the words "at a time when it was not reasonably safe to do so." *Burton v. Bi-State Dev. Agency*, 468 S.W.2d 4 (Mo. 1971).

Error to submit that defendant motorist stopped on the traveled portion of the highway since it omitted the elements of suddenly stopping without warning. (Given before adoption of MAI 17.20). *Joly v. Wippler*, 449 S.W.2d 565 (Mo. 1970).

Comparative fault instruction in negligence suit by motorist injured in rear-end collision was supported by evidence that motorist stopped vehicle on highway to allow oncoming truck to pass through bridge, bridge was as wide as paved portion of highway, motorist did not pull off onto shoulder of road, motorist did not engage emergency flashing lights, and road conditions were dark and wet. *Tennison v. State Farm Mut. Auto Ins. Co.*, 834 S.W.2d 846 (Mo.App. W.D. 1992).

Where initial stopping was for red light, and any negligence that occurred was the result of remaining stopped, MAI 17.20 was inappropriate. *Paxton v. Am. Family Mut. Ins. Co.*, 682 S.W.2d 896 (Mo.App. W.D. 1984).

Where plaintiffs' evidence supported both MAI 17.20, defendant stopping on highway, and MAI 17.12, defendant stopping without adequate warning, plaintiffs are entitled to choose their own theory of recovery and the court did not err in giving MAI 17.20 rather than MAI 17.12, as contended by defendant. *Certa v. Associated Bldg. Ctr., Inc.*, 560 S.W.2d 593 (Mo.App. 1977).

Where plaintiff-motorist ran into rear of defendant's motor grader moving backward in her lane of traffic, it was error to give her modified MAI 17.20, submitting only that defendant negligently *operated* its grader in plaintiff's lane of traffic. Without the submission of a negligent act, such as failure to warn, that was a roving commission. *Dick v. Scott Constr. Co.*, 539 S.W.2d 688 (Mo.App. 1976).

2. Parking on shoulder

Plaintiffs' verdict director against defendant for parking unlighted repair vehicle on shoulder of highway. *Penn v. Columbia Asphalt Co.*, 513 S.W.2d 679 (Mo.App. 1974).

17.21 [1993 New] Driving While Intoxicated

Defendant drove while intoxicated[1] to the extent that defendant's driving ability was impaired.

Notes on Use (1996 Revision)

1. Intoxication may include being under the influence of alcohol, controlled substances, or drugs. See § 577.001(2) and § 577.010, RSMo. This term may be modified to identify whether intoxication was caused by alcohol, a controlled substance, a drug, or a combination, if that fact is in issue; e.g., "was intoxicated by cocaine."

This is an optional submission of negligence that may be used as paragraph First of MAI 17.01 or as one of the alternate submissions in paragraph First of MAI 17.02. It may also be used as a submission in wrongful death cases, see MAI 20.01 and 20.02, and in comparative fault submissions, see MAI 37.02.

Committee Comment (2012 Revision)

A. Alcohol evidence may be admitted to show impairment due to alcohol consumption as evidence of negligence. It may also be admitted to establish how drinking affects a driver's ability to perceive and react. The seminal decision of *Rodriguez v. Suzuki Motors Corp.*, 936 S.W.2d 104 (Mo.banc 1996) (*Rodriguez I*) discussed the admissibility of alcohol evidence in civil cases.

B. Prior to *Rodriguez I*, the law in Missouri was that "evidence of a driver's alcohol consumption was admissible only if coupled with evidence of erratic driving or some other circumstance from which it might be inferred that the driver's physical condition was impaired at the time of the accident." *Rodriguez,* 936 S.W.2d at 106 (citing *Doisy v. Edwards*, 398 S.W.2d 846, 849–50 (Mo.banc 1966)). After Missouri's adoption of comparative fault in 1983, the *Rodriguez* court decided this two-part requirement was no longer tenable. Additionally, cases purporting to apply the "*Doisy* rule," as it came to be known, were widely disparate in result, see *Rodriguez,* 936 S.W.2d at 108.

C. Because of the adoption of comparative fault, as well as the incongruity of cases following *Doisy*, *Rodriguez I* announced a new rule, *id.* at 108 (citation omitted):

> Evidence of alcohol consumption is admissible, if otherwise relevant and material. This standard applies in two situations. First, when the proponent does not allege intoxication as an independent act of negligence, the evidence of drinking may be part of the proof of other negligent acts alleged . . ..
>
> The second situation occurs when intoxication is alleged as

> an independent act of negligence. Assuming a submissible case is made, intoxication is a basis for the verdict directing jury instruction.

D. As to discussions of evidence of alcohol consumption, *Doisy* and its progeny were overruled. *Rodriguez I,* 936 S.W.2d at 108.

Research References

West's Key Number Digest
Automobiles 🔑246(1)

Legal Encyclopedias
C.J.S., Motor Vehicles § 1622

18.00

VERDICT DIRECTING—AGENCY

18.01 Verdict Directing Modification Required

Research References

West's Key Number Digest
Principal and Agent 🔑194(1)

A.L.R. Library
A.L.R. Index, Agency
West's A.L.R. Digest, Principal and Agent 🔑194(1)

Legal Encyclopedias
C.J.S., Agency § 602

18.01 [2017 Revision] Verdict Directing Modification Required

Servant Not Joined

Where defendant master or principal is being sued and has denied agency of the alleged servant or agent, paragraph First in the verdict directing instruction shall be in the following form:

> First, the driver Jones was operating the *(defendant's)* motor vehicle within the scope and course of [employment by] [agency for][1] *(defendant's name)* [at the time of the collision].[2]

The remaining paragraphs of the verdict directing instruction will then be renumbered. The name of the servant or some other identification will be substituted for the word "defendant" in the remainder of the instruction. Thus if Verdict Directing Instruction 17.01 were to include the issue of agency it would read as follows:

> Your verdict must be for plaintiff if you believe:
>
> First, the driver Jones was operating the Ajax Company motor vehicle within the scope and course of employment by Ajax [at the time of the collision],[1] and
>
> Second, Jones violated the traffic signal, and
>
> Third, Jones was thereby negligent, and
>
> Fourth, as a direct result of such negligence plaintiff sustained damage.

Both Master and Servant Joined (Agency In Issue)

Where the master and servant are both joined as parties and agency is in issue, the verdict directing instruction against the servant will be a typical verdict directing instruction such as MAI 17.01. Since the verdict directing instruction contains those elements relevant to the liability of the servant, the only remaining issue relating to the master will be the agency issue. Under these circumstances it is not necessary to repeat the elements relating to the servant's negligence in the verdict directing instruction against the master. Thus, the verdict directing instruction against the master would read as follows:

> In your verdict you must find defendant Ajax responsible for any negligence of defendant Jones if you believe driver Jones was operating the Ajax Company motor vehicle within the scope and course of employment by Ajax.

In preparing the verdict form where the master's liability is submitted only on the servant's conduct, the servant is also joined, and agency is in issue, MAI 36.01 should be modified by adding the following:

> Note: Complete the following paragraph by writing the word(s) required by your verdict.

> On the claim of plaintiff for personal injury against defendant *(name of master),* we, the undersigned jurors, ____________ find *(name of master)* responsible for any
> ("do" or "do not")
> negligence of *(name of servant).*

Both Master and Servant Joined (Agency Not In Issue)

In a case where both the master and servant are joined and agency is not in issue, modifications should be made to the verdict directing instruction and the verdict form. See, for example, Note on Use No. 1 to MAI 17.01, which provides the following illustration:

> Your verdict must be for plaintiff [against defendant John Jones and defendant Ace Trucking Lines] if you believe: . . .

Similarly, in the verdict form, the introductory language should be changed to state:

On the claim of plaintiff *(state the name)* for personal injuries against [defendant *(state the name of servant)* and defendant *(state the name of master)*], we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*)	or	(Defendant *(state the name of servant)* and Defendant *(state the name of master)*)

Notes on Use (2012 Revision)

1. Select appropriate term.

2. Use bracketed term if in issue.

When the issue of agency is submitted, the appropriate definition must also be submitted. See MAI 13.02 to MAI 13.07(2).

See MAI 37.05(1) and 37.05(2) for discussion of agency issues in comparative fault cases and alternative methods of submission of those issues depending on the nature of the dispute.

See Illustration 35.04.

Committee Comment (1965 New)

A. See General Comment at MAI 13.01.

Research References

West's Key Number Digest
Principal and Agent 🔑194(1)

Legal Encyclopedias
C.J.S., Agency § 602

Annotations

In general 1
Agency in issue 2
Agency not in issue 3

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1. In general

MAI 23.05–18.01 submitting fraudulent representations by agent. *Tietjens v. General Motors Corp.*, 418 S.W.2d 75 (Mo. 1967).

Trial court's error in substituting phrase "was agent of" for "was employee of" in jury instruction on issue of agency did not result in manifest injustice or miscarriage of justice as required for error to be plain error and warrant reversal of judgment that hospital was vicariously liable for negligence of physician, since closing argument of defendant equated concepts of agency and employment and so removed any potential confusion amongst jury over whether term "agent" meant something different from the term "employee." V.A.M.R. 84.13(c). *Glidewell v. S.C. Management, Inc.*, 923 S.W.2d 940 (Mo.App. S.D. 1996).

2. Agency in issue

Error for plaintiff to omit MAI 13.05 (Definition-Agency-Scope of Employment) when verdict director used MAI 18.01 requiring a finding that driver was "within the scope and course of his employment." *Chandler v. New Moon Homes, Inc.*, 418 S.W.2d 130 (Mo.banc 1967).

Verdict director for false arrest based on agency (MAI 18.01 to 23.04) requires definition of scope of employment (MAI 13.02). *Peak v. W.T. Grant Co.*, 409 S.W.2d 58 (Mo.banc 1966).

Where agency of defendant's driver was in issue, verdict-directing instruction must be modified by substituting the name of the driver for that of defendant. Failure prejudicially erroneous. *Wills v. Townes Cadillac-Oldsmobile, Inc.*, 490 S.W.2d 257 (Mo. 1973).

When defense of contributory negligence depends on driver's being plaintiff's agent, it is error to submit a contributory negligence instruction without hypothesizing and defining agency. *Sanfilippo v. Bolle*, 432 S.W.2d 232 (Mo. 1968).

Trial court erred in giving Missouri Approved Instruction (MAI), stating that driver of log truck had to be "employee" of wood products company "operating his truck within the scope and course of his agency" in order for company to be liable in negligence to survivors of mother and father killed in collision with truck, and in refusing to give modified MAI instruction stating that driver had to be "agent" of company "operating his truck within the scope and course of his agency" in order for company to be liable; verdict directors ultimately submitted allowed jury to find for survivors only if the jury found driver was employee of company and that, coupled with agency definition instructions submitted, misstated the law. *Blunkall v. Heavy and Specialized Haulers, Inc.*, 398 S.W.3d 534 (Mo.App. S.D. 2013).

The jury shall be instructed on the appropriate definition and the verdict director shall be modified to submit to the jury the question of whether the agent acted within the scope and course of his agency when agency is in issue. *Agri Process Innovations, Inc. v. Envirotrol, Inc.*, 338 S.W.3d 381 (Mo.App. W.D. 2011).

When agency is in issue, defining "scope and course of agency" is not all that the trial court must do, rather, the trial court must also actually require the jury to find that the alleged agent acted within the scope and course of his agency. *Agri Process Innovations, Inc. v. Envirotrol, Inc.*, 338 S.W.3d 381 (Mo.App. W.D. 2011).

Where plaintiffs' recovery depends on agency of defendant's employee, that disputed fact must be submitted not only by definition of agency but also by inclusion in plaintiffs' verdict director. *Galemore Motor Co. v. State Farm Mut. Auto. Ins. Co.*, 513 S.W.2d 161 (Mo.App. 1974).

Although defendant's answer denied salesman was its agent, where plaintiff's evidence of agency was not refuted by other evidence, agency was a question of law and need not be hypothesized in plaintiff's verdict director. *Bowers v. S-H-S Motor Sales Corp.*, 481 S.W.2d 584 (Mo.App. 1972).

Verdict director which assumes agency is erroneous. *Dickey v. Nations*, 479 S.W.2d 208 (Mo.App. 1972).

Where defendant denied its employee was acting within the scope of his employment plaintiff's verdict director must hypothesize that element and the term must be defined. *Ratterree v. General Motors Corp.*, 460 S.W.2d 309 (Mo.App. 1970).

3. Agency not in issue

Where undisputed evidence showed defendant's employee created a dangerous condition plaintiff's verdict director need not hypothesize that element. *Cline v. Carthage Crushed Limestone Co.*, 504 S.W.2d 102 (Mo. 1973).

Where as a matter of law evidence showed employee was acting within the scope of his employment it was unnecessary to hypothesize that element in his verdict director. *Elliott v. St. Louis S.W. Ry. Co.*, 487 S.W.2d 7 (Mo. 1972).

Although plaintiff has the burden of proving agency, where collection manager's authority was uncontroverted, plaintiffs' verdict director properly omitted a finding on scope of authority. *Price v. Ford Motor Credit Co.*, 530 S.W.2d 249 (Mo.App. 1975).

Where undisputed evidence showed a partnership transaction there was no need to define acts within the scope of the partnership. *Restaurant Industries, Inc. v. Lum's, Inc.*, 495 S.W.2d 668 (Mo.App. 1973).

Conceded facts need not be submitted, so where agency of defendant's driver was established by defendant's evidence plaintiff's verdict director properly omitted an MAI 18.01 submission of agency. *Young v. Frozen Foods Express, Inc.*, 444 S.W.2d 35 (Mo.App. 1969).

Agency need not be submitted by MAI 18.01 nor scope of employment defined where agency is established as a matter of law by documentary evidence such as a policy of insurance. *Baker v. St. Paul Fire & Marine Ins. Co.*, 427 S.W.2d 281 (Mo.App. 1968).

Not error to omit definition of "scope of employment" where agency was not in issue. *Terry v. Sweeney*, 420 S.W.2d 368 (Mo.App. 1967).

19.00

VERDICT DIRECTING—MULTIPLE CAUSES OF DAMAGE

19.01 Verdict Directing Modification—Multiple Causes of Damage

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Research References

West's Key Number Digest
Negligence 🔑1741

A.L.R. Library
West's A.L.R. Digest, Negligence 🔑1741

Legal Encyclopedias
C.J.S., Negligence § 1009

19.01 [1986 Revision] Verdict Directing Modification—Multiple Causes of Damage

In a case involving two or more causes of damage, the "direct result" language of paragraph Third of verdict directing instructions such as 17.01 and 17.02 might be misleading. In such cases, at plaintiff's option, one of the following may be substituted:

> Third, such negligence directly caused or directly contributed to cause damage to plaintiff.[1]

> Third, such negligence either directly caused damage to plaintiff or combined with the [acts of *(here describe another causing damage)*] [condition of the *(here describe product)*][2] to directly cause damage to plaintiff.

Notes on Use (2012 Revision)

1. *Gustafson v. Benda*, 661 S.W.2d 11 (Mo.banc 1983) adopted pure comparative fault. In any case in which comparative fault is submitted, all verdict directing instructions should be modified with MAI 19.01. Since instructions submitting plaintiff's comparative fault in Chapter 32, and MAI 37.02 already use the language "directly caused or directly contributed to cause," it would be inconsistent not to use the MAI 19.01 verdict directing modification in plaintiff's verdict directing instruction against defendant in a comparative fault case.

2. Select the appropriate bracketed phrase.

These modifications may be used whether or not another causing damage is a party.

Caution: Where the verdict directing instruction is modified with one of the alternates in MAI 19.01 or an appropriate modification to submit "multiple causes" of damage in a case such as a death case, a products case, a premises case, or a medical malpractice case, care must be used in drafting a converse instruction by using substantially the same causation language as used in the verdict directing instruction. See *Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992).

In a case such as *Carlson v. K-Mart*, 979 S.W.2d 145 (Mo.banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the occurrence mentioned in the evidence" from MAI 4.01 and substitute the phrase "which *(describe the compensable event or conduct)* directly caused or directly contributed to cause."

Committee Comment (1995 New)

A. In 1986, the title of this instruction was changed from "Verdict Directing Modification—Joint Tortfeasors" to "Verdict Directing Modification—Multiple Causes of Damage" in order to avoid confusion and allow this modification in cases in which there are multiple causes of damage but which may not involve another party or tortfeasor. In *Gaines v. Property Servicing Company*, 276 S.W.2d 169 (Mo. 1955), it was held:

> The general rule is "that if a defendant is negligent and his negligence combines with that of another, or with any other independent, intervening cause, he is liable, although his negligence was not the sole negligence or the sole proximate cause, and although his negligence, without such other independent, intervening cause, would not have produced the injury." *Id.* at 173, 174. (Citations omitted.)

This modification is intended to employ these principles.

B. See the discussion of causation in *Callahan v. Cardinal Glennon Hosp.*, 863 S.W.2d 852 (Mo.banc 1993), in which the Supreme Court cited the language of this instruction favorably as an expression of the "but for" test of "causation in fact" and also discussed the classic law school example of the "thin skulled" plaintiff in the context of causation by defendant's negligence.

Research References

West's Key Number Digest
Negligence ⚷1741

Legal Encyclopedias
C.J.S., Negligence § 1009

Annotations

In general 1
Wrongful death 2

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1. In general

Damage instruction based on MAI 4.01, providing that injured customer's damages were only those that "directly resulted" from store owner's conduct, should have been modified to track verdict director based on MAI 19.01, providing that store owner was liable if its failure to use ordinary care "directly caused or directly contributed to cause" damage to customer; confusion engendered by conflict between these instructions prejudiced customer, entitling her to a new trial. *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo.banc 1998).

Joint tort-feasors, whether or not both are sued, may have a determination of their *relative fault. Missouri Pacific R.R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo.banc 1978).

Where plaintiff sued drivers A and B his verdict director hypothesizing B's negligence was erroneous in not limiting recovery to driver B, as per MAI 31.03 [Now 35.03] (Illustration: Instructions No. 4, No. 6 and No. 8). *Cash v. Bolle*, 423 S.W.2d 743 (Mo.banc 1968).

In action against joint tort feasors the plaintiff may but need not use MAI 19.01. Failure to do so merely increases plaintiff's burden. *Joly v. Wippler*, 449 S.W.2d 565 (Mo. 1970).

Adding an MAI 19.01 joint tortfeasor clause to an MAI 22.02 to 22.05 type verdict director without definition of negligence "would raise a serious question" since the former uses the word "negligence" and the latter is based on failure to use "ordinary care." (See now MAI 33.15). *Chambers v. Kansas City*, 446 S.W.2d 833 (Mo. 1969).

In action for gas explosion and unodorized gas against joint tort-feasors, joint negligence was properly submitted by including first clause of MAI 19.01 as third paragraph of verdict director. *Gathright v. Pendegraft*, 433 S.W.2d 299 (Mo. 1968).

MAI 19.01 may be used to modify the causation language in an instruction given in a case brought under the Missouri Human Rights Act (MHRA). *Hurst v. Kansas City, Missouri School Dist.*, 437 S.W.3d 327 (Mo.App. W.D. 2014).

MAI 19.01 is intended for situations in which there are multiple causes of damage, without limitation to specific causes of action. *Hurst v. Kansas City, Missouri School Dist.*, 437 S.W.3d 327 (Mo.App. W.D. 2014).

The purpose of MAI 19.01 is to avoid misleading the jury through the "direct result" language of the standard jury director when there are multiple causes or tortfeasors; it applies "in cases in which there are multiple causes of damage but which may not involve another party or tortfeasor." *Rinehart v. Shelter General Ins. Co.*, 261 S.W.3d 583 (Mo.App. W.D. 2008).

Multiple-cause instruction was warranted upon request as to whether any negligence of defendant driver in motor vehicle accident directly caused "or directly contributed to cause" damage to plaintiff driver's right shoulder that was additional to her pre-existing right shoulder injury; medical records reflected that in six weeks before accident plaintiff was treated by chiropractor more than ten times for neck and shoulder problems, but chiropractor opined that condition of right shoulder was worse after accident. *Higby v. Wein*, 996 S.W.2d 95 (Mo.App. E.D. 1999).

If instruction was erroneous by failing to find that worker's damage was caused by defect which existed when chemical was sold by defendant, instruction did not prejudice defendant, where it was clear from both instruction and the evidence that if worker was injured due to chemical, it was caused by defect which existed when chemical was sold. *Ray v. Upjohn Co.*, 851 S.W.2d 646 (Mo.App. S.D. 1993).

Trial court properly instructed in automobile accident case that defendant's negligence must directly contribute to cause plaintiff's damage, while at same time instructing on plaintiff's comparative fault. *Krenski v. Aubuchon*, 841 S.W.2d 721 (Mo.App. E.D. 1992).

Appellate court approved modification of MAI 25.04 and 25.05 (strict liability) with MAI 19.01 (multiple causes of injury). *Menschik v. Mid-America Pipeline Co.*, 812 S.W.2d 861 (Mo.App. W.D. 1991).

Not-in-MAI definition of the term "product" in MAI 25.04, as a "ladder-type track," held to be permissible. Modification of MAI 25.04 with MAI 19.01 held to be proper in stating that the product "directly caused or directly contributed to cause" decedent's death. *Eagleburger v. Emerson Electric Co.*, 794 S.W.2d 210 (Mo.App. S.D. 1990).

MAI sanctions the 19.01 joint tort-feasor "directly caused or directly contributed to cause damage to plaintiff" modification whether or not the other tort-feasor is a party. *Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 205 (Mo.App. W.D. 1988).

Omission of hospital which settled with wrongful death plaintiff at close of plaintiff's evidence from verdict directors and verdict forms for assessment of percentage of fault was not error. *Schiles v. Schaefer*, 710 S.W.2d 254 (Mo.App. E.D. 1986).

Verdict directors against physicians which hypothesized that negligence of physicians caused or directly contributed to cause death of decedent were proper even though contributory negligence of decedent was in issue and despite physician's contention that they were successive rather than joint tort feasors. *Schiles v. Schaefer*, 710 S.W.2d 254 (Mo.App. E.D. 1986).

Plaintiff bus passenger was injured in a right-angle collision between bus and motor vehicle at intersection controlled by stop lights. Each of plaintiff's verdict directors submitted the same negligence against bus company and motorist: failing to keep a lookout or violating the traffic light. Held erroneous as conflicting. *Alfultis v. Bi-State Development Agency*, 439 S.W.2d 206 (Mo.App. 1969).

2. Wrongful death

MAI 19.01 can apply to wrongful death cases if words "the death of" are substituted for "damage to" in third paragraph; in wrongful death action against asbestos manufacturers, trial court properly refused defendant's tendered instruction relating to "substantial contributing factor," since additional formulation of causation requirements would only have confused jury. *Hagen v. Celotex Corporation*, 816 S.W.2d 667 (Mo.banc 1991).

Deceased mine worker's survivors were entitled to new trial in wrongful death action against water truck owner due to plain error from combination of jury instructions on comparative fault, even though they submitted instruction which caused jury's confusion; survivors' instruction, which required jury to assign a percentage of fault to truck owner if, "as a direct result of such negligence," mine worker died, conflicted with truck owner's own instruction, which required assignment of percentage of fault to worker if his own negligence "directly caused or directly contributed to cause" his death, survivors had no clear indication that the "direct result" language was prohibited by truck owner's instruction, and each instruction, standing alone, was proper. *Bean v. Superior Bowen Asphalt Co., LLC*, 340 S.W.3d 275 (Mo.App. W.D. 2011).

Automobile manufacturer, as subsequent tortfeasor whose defective design resulted in fire that caused death, an indivisible injury, to automobile accident victims, was jointly and severally liable with original tortfeasor. *Mathes v. Sher Express, L.L.C.*, 200 S.W.3d 97 (Mo.App. W.D. 2006).

Multiple cause jury instruction modifier was warranted in deceased patient's widower's wrongful death action against medical center following elderly patient's death following fall suffered while in care of medical center; although patient had pre-existing medical conditions without which medical center's alleged negligence would only have directly caused a broken hip, patient's pre-existing medical conditions put her at risk of falling and compromised her body's ability to recover from the injuries that resulted from the fail. *Woodward v. Research Medical Center*, 2005 WL 2007878 (Mo.App. W.D. 2005).

Trial court's erroneous failure to instruct jury with multiple cause modifier based on patient's pre-existing medical conditions was prejudicial error in wrongful death action brought by patient's widower against medical center when elderly patient died three months after fall suffered as result of medical center's negligence; failure to modify instruction improperly required widower to prove that medical center's negligence "directly caused or directly contributed to cause" patient's injury, and jury's award of derivative past economic damages in survivorship/personal injury action indicated that jury found link between hospital's negligence and harm suffered by patient prior to her death. *Woodward v. Research Medical Center*, 2005 WL 2007878 (Mo.App. W.D. 2005).

It was proper to apply modification of verdict directing instruction for multiple causes of damage to a verdict director in a wrongful death action. *Bass v. National Super Markets, Inc.*, 1995 WL 95000 (Mo.App. E.D. 1995).

In wrongful death action arising out of accident on defendant's loading dock which allegedly led to truck driver's death by stroke, truck driver's preexisting arteriosclerosis condition, which may have made him more susceptible to stroke, was not additional cause of damage requiring use of MAI 19.01, since susceptibility was not equivalent of causation. *Wailand v. Anheuser Busch, Inc.*, 861 S.W.2d 710 (Mo.App. E.D. 1993). (But see 1995 Revisions to Notes on Use and Committee Comment to MAI 19.01.)

The modification suggested by 19.01 applies to the applicable wrongful death verdict director, MAI 20.02. Where the only difference between MAI 19.01 and fourth paragraph of plaintiff's verdict director was that "the death of" was substituted for "damage to," there was no error. *Honey v. Barnes Hosp.*, 708 S.W.2d 686 (Mo.App. E.D. 1986).

20.00

VERDICT DIRECTING—WRONGFUL DEATH

20.01 Single Negligent Act Submitted
20.02 Multiple Negligent Acts Submitted

Research References

West's Key Number Digest
Negligence 🔑1720

A.L.R. Library
A.L.R. Index, Wrongful Death Actions
West's A.L.R. Digest, Negligence 🔑1720

20.01 [1981 Revision] Single Negligent Act Submitted

Your verdict must be for plaintiff[1] if you believe:

First, plaintiff was *(here insert statutory qualification required to bring the action)*, and

Second, defendant violated the traffic signal, and

Third, defendant was thereby negligent,[2] and

Fourth, as a direct result of such negligence,[2] *(insert name of decedent)* died.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1996 Revision)

1. In any case involving more than one plaintiff or defendant, any reference to a particular party should include the name of that party, or other descriptive term. Where plaintiff submits against more than one defendant in separate verdict directors, the first line of the verdict director should be modified to indicate the particular defendant covered by this verdict director, i.e.:

Your verdict must be for plaintiff against defendant John Jones if you believe:

If the verdict director is applicable to the plaintiff's claim against more than one defendant, it can be described as follows:

Your verdict must be for plaintiff [against both defendants] [against defendant John Jones and defendant Ace Trucking Lines] if you believe:

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

This instruction submits the single act of violating a traffic signal. For other wrongful acts or omissions which may be hypothesized see MAI 17.03 and following. For submitting multiple acts of negligence see MAI 20.02.

In the event suit is brought by a plaintiff ad litem for the benefit of collateral heirs, see § 537.090, RSMo, and *Acton v. Shields*, 386 S.W.2d 363 (Mo. 1965) on the question of whether pecuniary loss must be submitted in the verdict directing instruction.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (2021 Revision)

A. For modification of verdict directing instructions to submit comparative fault, see MAI 37.01.

B. Pecuniary loss has not been hypothesized as an element of plaintiff's case because:

> "where it appears in a statutory action for death that the death was caused by defendant's negligence, nominal damages may be recovered, although no actual pecuniary damage has been shown . . .." 25 C.J.S., Death § 96, *quoted in Stroud v. Masek*, 262 S.W.2d 47, 51 (Mo. 1953).
>
> "Judgment for nominal damages is a substantial right since such a judgment decides the incident of costs." *Stroud, at 51.*

C. See §§ 537.080 to 537.095, RSMo.

D. Where suit involves multiple causes of damage, see MAI 19.01.

Research References

West's Key Number Digest
Negligence ⚷1720

Annotations

Aggravating circumstances 2
Causation 3
Comparative fault 4
Conversing damages 1

1. Conversing damages

In wrongful death case it is error to give separate converse instructions, one conversing negligence and the other conversing damages. *Higgins v. Gosney*, 435 S.W.2d 653 (Mo. 1968).

Where plaintiff gave MAI 20.01 in action for wrongful death omitting finding that plaintiff suffered damages (because nominal damages are presumed), and MAI 5.01 on her measure of damages, it was error for defendant to separately converse element of damages. *Aubuchon v. LaPlant*, 435 S.W.2d 648 (Mo. 1968).

2. Aggravating circumstances

Evidence that busy crossing was without effective warning warranted submission of aggravating circumstances clause. *Grothe v. St. L.-S.F. Ry. Co.*, 460 S.W.2d 711 (Mo. 1970).

3. Causation

A lookout submission submits failure to see and failure to avoid injury by any means supported by the evidence. Thus, plaintiff may argue defendant's failure to look and failure to swerve and sound a horn even when those elements are not submitted by plaintiff's verdict director. *Lovelace v. Reed*, 486 S.W.2d 417 (Mo. 1972).

4. Comparative fault

Deceased mine worker's survivors were entitled to new trial in wrongful death action against water truck owner due to plain error from combination of jury instructions on comparative fault, even though they submitted instruction which caused jury's confusion; survivors' instruction, which required jury to assign a percentage of fault to truck owner if, "as a direct result of such negligence," mine worker died, conflicted with truck owner's own instruction, which required assignment of percentage of fault to worker if his own negligence "directly caused or directly contributed to cause" his death, survivors had no clear indication that the "direct result" language was prohibited by truck owner's instruction, and each instruction, standing alone, was proper. *Bean v. Superior Bowen Asphalt Co., LLC*, 340 S.W.3d 275 (Mo.App. W.D. 2011).

20.02 [1983 Revision] Multiple Negligent Acts Submitted

Your verdict must be for plaintiff[1] if you believe:

First, plaintiff was *(here insert statutory qualification required to bring the action)*, and

Second, either:

defendant failed to keep a careful lookout, or

defendant drove at an excessive speed, or

defendant's automobile was on the wrong side of the road, and

Third, defendant, in any one or more of the respects submitted in paragraph Second was thereby negligent,[2] and

Fourth, as a direct result of such negligence[2] *(insert name of decedent)* died.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1996 Revision)

1. In any case involving more than one plaintiff or defendant, any reference to a particular party should include the name of that party, or other descriptive term. Where plaintiff submits against more than one defendant in separate verdict directors, the first line of the verdict director should be modified to indicate the particular defendant covered by this verdict director, i.e.:

> Your verdict must be for plaintiff against defendant John Jones if you believe:

If the verdict director is applicable to the plaintiff's claim against more than one defendant, it can be described as follows:

> Your verdict must be for plaintiff [against both defendants] [against defendant John Jones and defendant Ace Trucking Lines] if you believe:

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

In the event suit is brought by a plaintiff ad litem for the benefit of collateral heirs, see: § 537.090, RSMo and *Acton v. Shields*, 386 S.W.2d 363 (Mo. 1965), on the question of whether pecuniary loss must be submitted in the verdict directing instruction.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (2021 Revision)

A. For modification of verdict directing instructions to submit comparative fault, see MAI 37.01.

B. Pecuniary loss has not been hypothesized as an element of plaintiff's case because:

> "where it appears in a statutory action for death that the death was caused by defendant's negligence, nominal damages may be recovered, although no actual pecuniary damage has been shown...." 25 C.J.S., Death § 96, *quoted in Stroud v. Masek*, 262 S.W.2d 47, 51 (Mo. 1953).
>
> "Judgment for nominal damages is a substantial right since such a judgment decides the incident of costs." *Stroud, supra, at 51.*

See §§ 537.080 to 537.095, RSMo.

C. See Committee Comment following MAI 20.01.

D. Where suit involves multiple causes of damage, see MAI 19.01.

Research References

West's Key Number Digest
Negligence ⚷1720

Annotations

1. In general

Verdict form providing for one set of jurors' signatures, as well as jury instructions that "nine or more of you [jurors] must agree in order to return any verdict", adequately advised jury in wrongful death action that same nine jurors should have agreed on same element, act of negligence, causation, and amount of damages; even though negligent acts were submitted to jury in multiple disjunctive form, verdict directors were properly used where each submission of negligence was supported by evidence. *Stacy v. Truman Medical Center*, 836 S.W.2d 911 (Mo.banc 1992).

Multiple cause jury instruction modifier was warranted in deceased patient's widower's wrongful death action against medical center following elderly patient's death following fall suffered while in care of medical center, although patient had pre-existing medical conditions without which medical center's alleged negligence would only have directly caused a broken hip, patient's pre-existing medical conditions put her at risk of falling and compromised her body's ability to recover from the injuries that resulted from the fall. *Woodward v. Research Medical Center*, 2005 WL 2007878 (Mo.App. W.D. 2005).

Trial court's erroneous failure to instruct jury with multiple cause+ modifier based on patient's pre-existing medical conditions was prejudicial error in wrongful death action brought by patient's widower against medical center when elderly patient died three months after fall suffered as result of medical center's negligence; failure to modify instruction improperly required widower to prove that medical center's negligence "directly caused or directly contributed to cause" patient's injury, and jury's award of derivative past economic damages in survivorship/personal injury action indicated that jury found link between hospital's negligence and harm suffered by patient prior to her death. *Woodward v. Research Medical Center*, 2005 WL 2007878 (Mo.App. W.D. 2005).

The modification suggested by 19.01 applies to the applicable wrongful death verdict director, MAI 20.02. Where the only difference between MAI 19.01 and fourth paragraph of plaintiff's verdict director was that "the death of" was substituted for "damage to," there was no error. *Honey v. Barnes Hosp.*, 708 S.W.2d 686 (Mo.App. E.D. 1986).

21.00

ACTIONS AGAINST HEALTH CARE PROVIDERS

21.00 General Comment
21.01 Verdict Directing—No Comparative Fault
21.02 Verdict Directing—Single or Multiple Defendants With Comparative Fault—Multiple Negligent Acts
21.03 Damages—No Comparative Fault
21.04 Damages—Comparative Fault
21.05 Definitions—Categories of Damages
21.06 Limiting Instruction—Apportionment of Fault to Settling Tortfeasor under § 538.230 (Repealed H.B. 393 (2005))
21.07 Derivative Claims—Loss of Consortium, Loss of Services or Medical Expenses
21.08 Verdict Directing—Lost Chance of Survival—No Comparative Fault—Multiple Negligent Acts
21.09 Damages—Lost Chance of Survival—No Comparative Fault
21.10 Verdict Directing—Lost Chance of Survival—Comparative Fault—Multiple Negligent Acts
21.11 Damages—Lost Chance of Survival—Comparative Fault
21.12 Verdict Directing—Lost Chance of Recovery (Non-Death) Cases—No Comparative Fault—Multiple Negligent Acts
21.13 Damages—Lost Chance of Recovery (Non-Death) Cases—No Comparative Fault
21.14 Verdict Directing—Lost Chance of Recovery (Non-Death) Cases—Comparative Fault—Multiple Negligent Acts
21.15 Damages—Lost Chance of Recovery (Non-Death) Cases—Comparative Fault

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Research References

West's Key Number Digest
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A.L.R. Library
A.L.R. Index, Comparative Negligence; Instructions to Jury; Loss of Consortium; Negligence
West's A.L.R. Digest, Negligence 🔑1720, 1746

Legal Encyclopedias
C.J.S., Negligence § 1018

21.00 [2012 New] General Comment

A. The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230 (repealed by H.B. 393), and (2) possibly the revisions by H.B. 393 with respect to punitive damages in § 510.265 and § 537.067, RSMo, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067 on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Research References

West's Key Number Digest
Negligence ⚷1720

Legal Encyclopedias
C.J.S., Negligence § 1018

21.01 [1988 Revision] Verdict Directing—No Comparative Fault

Your verdict must be for the plaintiff if you believe:

First, defendant *(here set out act or omission complained of; e.g., "failed to set plaintiff's broken leg bones in natural alignment," or "left a sponge in plaintiff's chest after performing an operation," or "failed to administer tetanus antitoxin")*, and

Second, defendant was thereby negligent,[1] and

Third, as a direct result of such negligence[1] plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1990 Revision)

1. The terms "negligent" and "negligence" must be defined. See definition at MAI 11.06.

If the health care provider-patient relationship is in issue, add: "First, defendant undertook to treat plaintiff as a health care provider," and then renumber the other paragraphs.

* Add if complete affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. See MAI 21.02.

Committee Comment (2012 Revision)

A. Where suit is for wrongful death, see MAI 20.01 and 20.02.

B. Where suit is for loss of services or medical expenses of dependent, see MAI 31.04.

C. Where there are multiple causes of damage, see MAI 19.01.

D. A doctor may be liable for failing to inform the patient of dangers incident to treatment. *Mitchell v. Robinson*, 334 S.W.2d 11 (Mo. 1960). See also *Steele v. Woods*, 327 S.W.2d 187 (Mo. 1959); and *Kinser v. Elkadi*, 674 S.W.2d 226 (Mo.App. S.D. 1984); *Harrell v. Witt*, 755 S.W.2d 296 (Mo.App. W.D. 1988); and *Baltzell v. Van Buskirk*, 752 S.W.2d 902 (Mo.App. W.D. 1988).

E. Where comparative fault of the patient is in issue, see MAI 32. 06, MAI Chapter 37.00, and MAI 21.02.

F. If fault is to be apportioned under § 538.230, RSMo, (repealed in 2005 By HB 393) between two or more defendants in a case where no comparative fault is sought against the plaintiff, see Illustration 35.22 (and Committee Comment).

G. For medical malpractice cases in which the doctrine of "res ipsa loquitur" is applicable, see *Sides v. St. Anthony's Medical Center*, 258 S.W.3d 811 (Mo.banc 2008); and MAI 31.02(3).

Research References

West's Key Number Digest

Physicians and Surgeons ⚷18.100

Legal Encyclopedias

C.J.S., Physicians, Surgeons, and other Health-Care Providers §§ 146, 119 to 122

Annotations

In general 1
Joint tort-feasors 5
Modification 2
Standard of negligence 3
Ultimate facts 4

1. In general

Jury instruction in medical malpractice case, which submitted one issue four times and another issue twice, was improperly duplicative, argumentative, complex, and long. *Rogers v. Bond*, 839 S.W.2d 292 (Mo.banc 1992).

2. Modification

Malpractice case, arthroscopic surgery on elbow. Verdict directing instruction approved as to the following alternative submissions: "Placed the lateral incision at the wrong location in relation to the anatomical landmarks of the elbow," "failed to advise plaintiff of the risk of permanent loss of function * * *," and "failed to supervise placement of the lateral incision. * * *" Discussion of "ultimate facts." Use of the word "wrong" held to be appropriate. Not a roving commission and not argumentative. *Spain v. Brown*, 811 S.W.2d 417 (Mo.App. E.D. 1991).

In malpractice action against hospital premised on negligence of nurse anesthetist, plaintiffs' verdict-directing instruction was necessary modification of MAI 21.01 to submit plaintiffs' theory that administration of high spinal by nurse combined with other drugs to cause plaintiff's injury. *Yoos v. Jewish Hosp. of St. Louis*, 645 S.W.2d 177 (Mo.App. E.D. 1982).

3. Standard of negligence

MAI 11.06 (now revised) states the standard of medical negligence under Missouri law. *Swope v. Printz*, 468 S.W.2d 34 (Mo. 1971).

Instructions concerning negligent performance of surgery and informed consent, when read together, were prejudicially erroneous in medical malpractice action; one instruction defined informed consent as consent based upon not only requisite elements of professional standard, but also upon disclosure of information which would lead reasonable person to withhold consent to surgery. *Harrell v. Witt*, 755 S.W.2d 296, 298–99 (Mo.App. W.D. 1988).

Instruction defining informed consent should not be given in medical negligence cases based on failure of physicians to make full disclosure to patient before obtaining consent to treatment. Theory of negligence is the same in medical malpractice case regardless of the claim. *Baltzell v. Van Buskirk*, 752 S.W.2d 902, 908 (Mo.App. W.D. 1988).

Where decedent's comparative negligence injected more than one standard of care into the case, MAI 11.06 was properly modified by MAI 11.08. Additionally, the phrase, "health care provider" was unambiguous and needed no further definition. *Schiles v. Schaefer*, 710 S.W.2d 254 (Mo.App. E.D. 1986).

4. Ultimate facts

Jury instruction, in malpractice case, which tracked plaintiffs' expert's testimony as to possible causes for injury was proper. *Wilson v. Lockwood*, 711 S.W.2d 545 (Mo.App. W.D. 1986).

The phrase "not medically proper" did not submit the ultimate facts which define for the jury plaintiffs' specific theory of negligence and gave the jury a "roving commission" to speculate and determine on its own and in what manner the procedure was "not medically proper." *Grindstaff v. Tygett*, 655 S.W.2d 70 (Mo.App. E.D. 1983).

5. Joint tort-feasors

Verdict directors against physicians which hypothesized that negligence of physicians caused or directly contributed to cause death of decedent were proper even though contributory negligence of decedent was in issue and despite physician's contention that they were successive rather than joint tort-feasors. *Schiles v. Schaefer*, 710 S.W.2d 254 (Mo.App. E.D. 1986).

21.02 [1988 New] Verdict Directing—Single or Multiple Defendants With Comparative Fault—Multiple Negligent Acts

In your verdict you must assess a percentage of fault to defendant *(state the name)* [whether or not plaintiff was partly at fault][1] if you believe:

First, defendant *(state the name)* either:

(here set out act or omission complained of), or

(here set out alternative act or omission complained of), and

Second, defendant *(state the name)*, in any one or more of the respects submitted in paragraph First, was thereby negligent,[2] and

Third, such negligence[2] directly caused or directly contributed to cause damage to plaintiff.[3]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of complete affirmative defense instruction)*].

Notes on Use (1988 New)

1. This bracketed phrase may be used at plaintiff's option in a comparative fault case.

2. The terms "negligent" and "negligence" must be defined. See MAI 11.06.

3. Paragraph Third is shown here in accordance with the first alternate of MAI 19.01.

* Add if complete affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (2012 Revision)

A. See Committee Comment to MAI 21.01.

B. For medical malpractice cases in which the doctrine of "res ipsa loquitur" is applicable, see *Sides v. St. Anthony's Medical Center*, 258 S.W.3d 811 (Mo.banc 2008); and MAI 31.02(3).

Research References

West's Key Number Digest
Negligence ⚷1746

Annotations

In general 1
Roving commission 2

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1. In general

Verdict directors in medical malpractice action arising out of arthroscopy in which patient's radial nerve was partially severed did not permit jury to infer negligence from fact of injury; if jury had believed defendants' evidence, challenged instructions permitted finding that regardless of fact that nerve was partially severed, defendants were not negligent. *Spain v. Brown*, 811 S.W.2d 417 (Mo.App. E.D. 1991).

2. Roving commission

Instruction was not impermissible roving commission instruction in medical malpractice action against nurse's employer where MAI approved language did not mislead, misdirect, or confuse the jury and instruction was not too general. *Huelskamp v. Patients First Health Care, LLC*, 475 S.W.3d 162 (Mo.App. E.D. 2014).

Instruction, which directed verdict upon finding of "detectable sign of cancer," rather than "microcalcifications," did not create roving commission, and was not misleading, confusing, or prejudicial, in action in which husband of deceased patient alleged that radiologist's misdiagnosis of cancer caused patient's death; one doctor testified that microcalcifications could be suggestive of cancer, suspicious for cancer, and sometimes virtually diagnostic, another doctor testified that most calcifications are benign, and instruction with word "microcalcifications" would have allowed jury to find radiologist liable if he failed to report even benign microcalcifications. *Portis v. Greenhaw*, 38 S.W.3d 436 (Mo.App. W.D. 2001).

21.03 [1988 New] Damages—No Comparative Fault

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][1] as a direct result of the occurrence[2] mentioned in the evidence.

Any damages you award must be itemized by the categories set forth in [the] verdict form [________ *(insert letter of verdict form if multiple packages are submitted)*].

Notes on Use (2002 Revision)

1. This may be added if supported by the evidence.

2. When the term "occurrence" must be modified, substitute some descriptive phrase that specifically describes the compensable event or conduct. The term "occurrence" may be modified in any case where the evidence discloses more than one event or health care provider that is claimed to have caused injury or damage. See Note 3 of the Notes on Use to MAI 4.01.

In a case such as *Carlson v. K-Mart*, 979 S.W.2d 145 (Mo.banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the occurrence mentioned in the evidence" from this instruction and substitute the phrase "that *(describe the compensable event or conduct)* directly caused or directly contributed to cause."

Other modifications also may be appropriate.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

This is the damage instruction to be used in cases against health care providers for personal injury where no issue of plaintiff's comparative fault is submitted. See verdict form MAI 36.20 and MAI 36.21.

Committee Comment (2012 Revision)

A. MAI 21.03 through MAI 21.07 and verdict forms 36.20 through 36.22 and 36.24 through 36.27 are applicable to causes of action against health care providers accruing on or after February 3, 1986, and subject to the provisions of §§ 538.205 through 538.230, RSMo.

B. The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230 (repealed by H.B. 393), and (2) possibly the revisions by H.B. 393 with respect to punitive damages in § 510.265 and § 537.067, RSMo, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067 on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Research References

West's Key Number Digest
Negligence ⚿1746

Annotations

1. In general

MAI 21.03 and 36.20, which require itemization of damages in actions against "health care" providers, did not apply to amputee's professional negligence suit against orthotics and prosthetics laboratory, which was not licensed by any governmental body. *Stalcup v. Orthotic & Prosthetic Lab, Inc.*, 989 S.W.2d 654 (Mo.App. E.D. 1999).

21.04 [1988 New] Damages—Comparative Fault

If you assess a percentage of fault to [any][1] defendant, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][2] as a direct result of the occurrence[3] mentioned in the evidence. You must state such total amount of plaintiff's damages in your verdict, and you must itemize those total damages by the categories set forth in [the] verdict form [________ *(insert letter of verdict form if multiple packages are submitted)*].

In determining the total amount of plaintiff's damages and in itemizing those total damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.

Notes on Use (2002 Revision)

1. Insert if more than one defendant.

2. This may be added if supported by the evidence.

3. When the term "occurrence" must be modified, substitute some descriptive phrase that completely describes the compensable event or conduct. The term "occurrence" may be modified in any case where the evidence discloses more than one event or health care provider claimed to have caused injury or damage. The first example in Note 3 of MAI 4.01, ". . . as a direct result of the conduct of defendant as submitted in Instruction Number ________," is not appropriate in a comparative fault case because the jury is instructed to determine "total damages," which are obviously the direct result of the conduct of *both* the defendant *and* the plaintiff. The above-quoted example would inappropriately restrict the jury's assessment of damages to those damages solely caused by defendant's conduct.

For further discussion see MAI 37.03 and MAI 4.01.

In a case such as *Carlson v. K-Mart*, 979 S.W.2d 145 (Mo.banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the occurrence mentioned in the evidence" from this instruction and substitute the phrase "that *(describe the com-*

pensable event or conduct) directly caused or directly contributed to cause."

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

Committee Comment (2012 Revision)

A. MAI 21.03 through MAI 21.07 and verdict forms 36.20 through 36.22 and 36.24 through 36.27 are applicable to causes of action against health care providers accruing on or after February 3, 1986, and subject to the provisions of §§ 538.205 through 538.230, RSMo.

B. The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230 (repealed by H.B. 393), and (2) possibly the revisions by H.B. 393 with respect to punitive damages in § 510.265 and § 537.067, RSMo, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067 on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Research References

West's Key Number Digest
Negligence ⚷1746

Legal Encyclopedias
C.J.S., Negligence § 1018

21.05 [1988 New] Definitions—Categories of Damages

In these instructions, you are told to itemize any damages you award by the categories set forth in [the] verdict form [________ *(insert letter of verdict form if multiple packages are submitted)*].

The phrase "past economic damages" means those damages incurred in the past for pecuniary harm such as medical expenses for necessary drugs, therapy, and for medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitative services and for past lost earnings and for past lost earning capacity.

The phrase "past non-economic damages" means those damages arising in the past from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

The phrase "future medical damages" means those damages arising in the future for medical expenses such as necessary drugs, therapy, and medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitative services.

The phrase "future economic damages" means those damages arising in the future from pecuniary harm such as lost earnings and lost earning capacity.

The phrase "future non-economic damages" means those damages arising in the future from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

Notes on Use (1991 Revision)

The phrases in the verdict form describing the categories of damages to be itemized in a suit against a health care provider must be defined.

If a derivative claim such as loss of consortium, loss of services or medical expenses (spouse or minor injured) is also involved in an action against a health care provider, one or more definitions in this instruction may need to be modified depending on the elements of recoverable damages in the derivative claim. See MAI 21.07 and Illustration 35.18.

Committee Comment (2012 Revision)

A. MAI 21.03 through MAI 21.07 and verdict forms 36.20 through 36.22 and 36.24 through 36.27 are applicable to causes of action against health care providers accruing on or after February 3, 1986, and subject to the provisions of §§ 538.205 through 538.230, RSMo.

B. The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230 (repealed by H.B. 393), and (2) possibly the revisions by H.B. 393 with respect to punitive damages in § 510.265 and § 537.067, RSMo, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067 on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

C. By its terms, § 538.210.1, RSMo, provides for applicability of Chapter 538 to both personal injury and wrongful death claims arising out of negligent health care. However, the definitions provided by § 538.205 only relate to actions for personal injury. Compare the elements of damage for which recovery is allowed under § 537.090 in wrongful death actions. Case law has not yet discussed or determined whether modification of MAI 21.05 is necessary in a wrongful death action against a health care provider.

Research References

West's Key Number Digest
Negligence ⚷1720

21.06 [2012 Revision] Limiting Instruction—Apportionment of Fault to Settling Tortfeasor under § 538.230 (Repealed H.B. 393 (2005))

If a released person is included in the verdict form, and the jury has knowledge from the evidence or a trial incident of a release or payment pursuant to a release, the following instruction should be given as a separate instruction:

> Plaintiff's claim against *(name of released party)* has been settled. In determining the total amount of plaintiff's damages and in assessing percentages of fault, you are not to consider such settlement. The total damages assessed by you on plaintiff's claim against the defendant(s) *(or state the names of the defendant(s))* will be reduced by the judge by any percentage of fault you assess to *(state the name or names of the released parties)*.

Committee Comment (2012 Revision)

A. CAUTION: H.B. 393 repealed § 538.230 in 2005. Thus, for cases filed after August 28, 2005, there is no apportionment of fault to a settling tortfeasor in medical malpractice cases. Rather, a settlement with a health care provider will be handled under H.B. 393 in the same fashion as a settlement in any other case. See MAI 1.06, 7.02, 34.05, and 36.19.

B. This instruction is to be used whenever the verdict form includes the name of a released person and the jury has knowledge that one or more persons have settled with the plaintiff. Case law will determine whether the jury is always entitled to know about the settlement or whether that fact will only be in evidence when it is relevant for some other purpose such as to show bias of a witness who has settled.

C. MAI 21.03 through MAI 21.07 and verdict forms 36.20 through 36.22 and 36.24 through 36.27 are applicable to causes of action against health care providers accruing on or after February 3, 1986, and subject to the provisions of §§ 538.205 through 538.230, RSMo.

D. Compare the law regarding settlements and settling tortfeasors in comparative fault cases other than those involving actions against health care providers under §§ 538.205 through 538.230, RSMo. See § 537.060, RSMo; *Jensen v. ARA Services, Inc.*, 736 S.W.2d 374 (Mo.banc 1987); *Allen v. Perry*, 722 S.W.2d 98 (Mo.App. E.D. 1986); and *Schiles v. Schaefer*, 710 S.W.2d 254 (Mo.App. E.D. 1986).

E. See Illustrations 35.21 and 35.22 and Committee Comments for cases under § 538.230 prior to repeal by H.B. 393.

Research References

West's Key Number Digest
Negligence ⚷1746

21.07 [2016 Revision] Derivative Claims—Loss of Consortium, Loss of Services or Medical Expenses

A. In actions against health care providers involving a personal injury claim and a derivative claim for loss of consortium, services or medical expenses (spouse or minor injured), it will be necessary to modify some instructions from Chapter 21 and the verdict form (from MAI 36.20, 36.21, or 36.22) applicable to health care providers by incorporating aspects of those instructions applicable to derivative claims.

B. See MAI 4.18 for the damage instruction in a non-comparative fault case with both injury and derivative claims. MAI 21.03 should be modified with MAI 4.18 to submit damages in such a case involving a health care provider.

C. Similarly, MAI 37.08 would be used to modify MAI 21.04 to submit damages for injury and derivative claims in a case against a health care provider involving comparative fault.

D. MAI 31.04 would be used as the verdict directing instruction to submit the derivative claim in any action against a health care provider.

E. MAI 21.05, defining the categories of damages in actions against health care providers, should be modified appropriately in a case involving both primary and derivative claims by including the phrase "loss of consortium" in the "non-economic damages" categories and by including a descriptive term identifying other recoverable damages in appropriate categories.

F. MAI 36.20 and MAI 36.21, the verdict forms for use in actions against health care providers (*without* comparative fault), will require modification with MAI 36.23 to allow the jury to itemize categories of damages on both the injury claim and the derivative claim in the non-comparative fault case against a health care provider.

G. MAI 36.22, the verdict form for use in actions against health care providers (*with* comparative fault), will require modification with MAI 37.09 to allow the jury to itemize damages on both claims in the comparative fault case against a health care provider.

H. See Illustration 35.18 and Illustration 35.20.

Research References

West's Key Number Digest
Negligence ⚷1720

21.08 [1995 Revision] Verdict Directing—Lost Chance of Survival—No Comparative Fault—Multiple Negligent Acts

Your verdict must be for plaintiff *(state name of plaintiff ad litem or personal representative)*, if you believe:

First, defendant *(state the name)* either:

(here set out act or omission complained of), or

(here set out alternative act or omission complained of), and

Second, *(state name of decedent)* then had a material chance of [survival] [recovery][1], and

Third, defendant, in any one or more of the respects submitted in paragraph First, was thereby negligent[2], and

Fourth, as a direct result of such negligence[2], *(state name of decedent)* lost [all] [or] [a material part of][3] such chance of [survival] [recovery][1].

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1993 New)

1. Select a term. The term "recovery" has reference to that recovery which could have been obtained if the negligently omitted or improper medical diagnosis or treatment had been properly rendered and had been successful. It does not necessarily mean a complete recovery. The term "recovery", under appropriate circumstances, may be modified to expand or clarify this concept.

2. The terms "negligent" and "negligence" must be defined. See definition at MAI 11.06.

3. Select applicable phrase or phrases.

If the health care provider-patient relationship is in issue, add an appropriate paragraph, such as: "First, defendant undertook to treat decedent as a health care provider," and then renumber the other paragraphs.

* Add if complete affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (2012 Revision)

A. Where there are multiple causes of lost chance of survival, see MAI 19.01.

B. Where this verdict directing instruction, MAI 21.08, is used to submit a "lost chance of recovery (survival)", see MAI 21.09 for the damage instruction and MAI 36.24 for the verdict form.

C. Where comparative fault of the patient is in issue, see MAI 32.06, MAI Chapter 37.00, MAI 21.10, and MAI 36.25.

D. This instruction applies to the cause of action for "lost chance of recovery (survival)" established in *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo.banc 1992). *Wollen* discussed the "lost chance of recovery" theory in the context of a survival action under § 537.020, RSMo, brought by a personal representative of the estate of an individual who died after losing a material chance of recovery from cancer. *Wollen* also discussed the "lost chance of recovery" theory in the context of "loss of a limb".

E. See the provisions affecting "lost chance" in § 537.021, RSMo, which provides that a person in the class entitled to recover for wrongful death under § 537.080, RSMo, may request the appointment of a plaintiff ad litem to maintain the "loss of a chance" action instead of a personal representative. The proceeds of the "loss of a chance" action are for the benefit of those class members delineated under § 537.080, and the "lost chance" theory may be maintained as an alternative theory in a wrongful death case.

Research References

West's Key Number Digest
Negligence ⚷1746

21.09 [1996 Revision] Damages—Lost Chance of Survival—No Comparative Fault

If you find in favor of plaintiff *(state name of plaintiff ad litem or personal representative)*, then you must determine the total amount that you believe will fairly and justly value any damages *(state name of decedent)* sustained before death as a direct result of the absence of recovery[1], and any damages *(state name of decedent)* survivors sustained after the death [and are reasonably certain to sustain in the future][2] as a direct result of the death of *(state name of decedent)*. You must state such total amount in your verdict, and you must itemize that total amount by the categories of damages set forth in the verdict form.

In your verdict, you must also state, as a percentage, the chance of [recovery] [survival][3] that you find *(state name of decedent)* lost. In determining the total amount of damages, you must not reduce such damages by the percentage you assess as the lost chance of [recovery] [survival].[3] The judge will compute the final award by multiplying the total amount you find as damages by the percentage you assess as the lost chance of [recovery] [survival][3].

You must not consider grief or bereavement suffered by reason of the death.

Notes on Use (1996 Revision)

1. The term "recovery" has reference to that recovery which could have been obtained if the negligently omitted or improper medical diagnosis or treatment had been properly rendered and had been successful. It does not necessarily mean a complete recovery. The phrase "absence of recovery," under appropriate circumstances, may be modified to expand or clarify this concept.

2. This may be added if supported by the evidence.

3. Select a term.

This is the damage instruction to be used in actions against health care providers for lost chance of recovery (survival) where no issue of plaintiff's comparative fault is submitted. See verdict form MAI 36.24.

While a case in which the "lost chance of recovery" resulting in death is brought in the name of the plaintiff ad litem or personal representative of the decedent, damages are to be determined in accordance with elements of damages in a wrongful death case and set forth in § 537.090, RSMo. Likewise, the "survivors" of decedent referred to in this instruction, and from whose perspective damages due to the death are to be determined, are those persons allowed to recover in a wrongful death case as set forth in § 537.080, RSMo.

Committee Comment (2021 Revision)

A. In lost chance of recovery (survival) actions, damages are determined in accordance with the method mandated by *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 684, n. 2 (Mo.banc 1992). See also §§ 538.205 *et seq.*, RSMo, for actions against health care providers.

B. During the instruction conference, the parties and the court should discuss (on the record) just what damages are supported and allowed by the law and the evidence and can be properly argued to the jury. In this way, jury arguments can proceed without undue interruption.

C. See Committee Comment to MAI 21.08.

D. The Committee is unable to determine under existing Missouri law whether the doctrine of mitigation of damages/avoidable consequences (See MAI 32.29 and MAI 4.01) is applicable to wrongful death cases in addition to the statutory "mitigating circumstances attending the death" under § 537.090, RSMo, (See MAI 6.01). Thus, the Committee takes no position on such issue.

E. Where suit involves multiple causes of damage, see MAI 19.01.

Research References

West's Key Number Digest
Negligence ⚷1746

21.10 [1993 New] Verdict Directing—Lost Chance of Survival—Comparative Fault—Multiple Negligent Acts

In your verdict you must assess a percentage of fault to defendant *(state the name)* [whether or not *(state name of decedent)* was partly at fault][1] if you believe:

First, defendant *(state the name)* either:

(here set out act or omission complained of), or

(here set out alternative act or omission complained of), and

Second, *(state name of decedent)* then had a material chance of [survival] [recovery][2], and

Third, defendant, in any one or more of the respects submitted in paragraph First, was thereby negligent[3], and

Fourth, such negligence[3] directly caused or directly contributed to cause *(state name of decedent)* to lose [all] [or] [a material part of][4] such chance of [survival] [recovery][2].

* [unless you believe you must not assess a percentage of fault to defendant by reason of Instruction Number ________ *(here insert number of complete affirmative defense instruction)*].

Notes on Use (1993 New)

1. This bracketed phrase may be used at plaintiff's option in a comparative fault case.

2. Select a term. The term "recovery" has reference to that recovery which could have been obtained if the negligently omitted or improper medical diagnosis or treatment had been properly rendered and had been successful. It does not necessarily mean a complete recovery. The term "recovery," under appropriate circumstances, may be modified to expand or clarify this concept.

3. The terms "negligent" and "negligence" must be defined. See MAI 11.06.

4. Select applicable phrase or phrases.

Paragraph Fourth is shown here modified in accordance with the first alternate of MAI 19.01.

* Add if complete affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (1993 New)

A. Where this verdict directing instruction, MAI 21.10, is used to submit a "lost chance of recovery (survival)" with comparative fault in issue, see MAI 21.11 for the damage instruction and verdict form MAI 36.25.

B. See Notes on Use and Committee Comment to MAI 21.08.

Research References

West's Key Number Digest
Negligence ⚿1746

Annotations

1. In general

Patient was not entitled to a jury instruction that physician breached the duty of care when he either characterized the palpable mass on patient's right breast as "likely to be benign" and "this finding reduces the likelihood" that the lesion is significant, in loss of chance malpractice case, where the record was full of "findings," and the instruction was unclear as to which finding it referred to. *Marion v. Marcus*, 199 S.W.3d 887, 895 (Mo.App. W.D. 2006).

21.11 [1996 Revision] Damages—Lost Chance of Survival—Comparative Fault

If you assess a percentage of fault to [any][1] defendant, then, disregarding any fault on the part of *(state name of decedent)*, you must determine the total amount that you believe will fairly and justly value any damages *(state name of decedent)* sustained before death as a direct result of the absence of recovery[2], and any damages *(state the name of decedent)* survivors sustained after the death [and are reasonably certain to sustain in the future][3] as a direct result of the death of *(state name of decedent)*. You must state such total amount in your verdict, and you must itemize that total amount by the categories of damages set forth in the verdict form.

In your verdict, you must also state, as a percentage, the chance of [recovery] [survival][4] that you find *(state the name of decedent)* lost. In determining the total amount of damages, you must not reduce such damages by the percentage you assess as the lost chance of [recovery] [survival].[4]

In determining the total amount of damages, you must not reduce such amount by any percentage of fault you may assess to *(state name of decedent)*.

The judge will compute the final award by:

First, multiplying the amount you find as total damages by the percentage you assess as the lost chance of [recovery] [survival][4]; and

Second, making a reduction by any percentage of fault you assess to *(decedent's name)*.

You must not consider grief or bereavement suffered by reason of the death.

Notes on Use (1996 Revision)

1. Insert if more than one defendant.

2. The term "recovery" has reference to that recovery which could have been obtained if the negligently omitted or improper medical diagnosis or treatment had been properly rendered and had been successful. It does not necessarily mean a complete recovery. The phrase "absence of recovery," under appropriate circumstances, may be modified to expand or clarify this concept.

3. This may be added if supported by the evidence.

4. Select a term.

This is the damage instruction to be used in actions against health care providers for lost chance of recovery (survival) where plaintiff's comparative fault is submitted. See verdict form MAI 36.25.

Committee Comment (2002 Revision)

A. See Committee Comment to MAI 21.08 and MAI 21.09.

B. The Committee is unable to determine under existing Missouri law whether the doctrine of mitigation of damages/avoidable consequences (See MAI 32.29 and MAI 4.01) is applicable to wrongful death cases in addition to the statutory "mitigating circumstances attending the death" under § 537.090, RSMo. (See MAI 6.01). Thus, the Committee takes no position on such issue.

Research References

West's Key Number Digest
Negligence 🔑1746

21.12 [1994 New] Verdict Directing—Lost Chance of Recovery (Non-Death) Cases—No Comparative Fault—Multiple Negligent Acts

Your verdict must be for plaintiff if you believe:

First, defendant *(state the name)* either:

(here set out act or omission complained of), or

(here set out alternative act or omission complained of), and

Second, plaintiff then had a material chance of [survival] [recovery][1], and

Third, defendant, in any one or more of the respects submitted in paragraph First, was thereby negligent[2], and

Fourth, as a direct result of such negligence[2], plaintiff lost [all] [or] [a material part of][3] such chance of [survival] [recovery][1].

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (2002 Revision)

1. This may be added if supported by the evidence.

2. The term "recovery" has reference to the recovery that could have been obtained if the negligently omitted or improper medical diagnosis or treatment had been properly rendered and had been successful. It does not necessarily mean a complete recovery. The phrase "absence of recovery," under appropriate circumstances, may be modified to expand or clarify this concept.

3. Select a term.

This is the damage instruction to be used in actions against health care providers for lost chance of recovery ("lost limb") cases where *no* issue of plaintiff's comparative fault is submitted. See verdict form MAI 36.26.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

* Add if complete affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (2002 Revision)

A. Where there are multiple causes of a loss of a chance, see MAI 19.01.

B. Where this verdict directing instruction, MAI 21.12, is used to submit a "loss of a chance" in "lost limb" cases, see MAI 21.13 for the damage instruction and MAI 36.26 for the verdict form.

C. Where comparative fault of the patient is in issue, see MAI 32. 06, MAI Chapter 37.00, MAI 21.14, and MAI 36.27.

D. *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo.banc 1992), discussed the "lost chance of recovery" theory in the context of a survival action under § 537.020, RSMo, brought by a personal representative of the estate of an individual who died after losing a material chance of recovery from cancer. *Wollen* also discussed the "lost chance of recovery" theory in the context of "loss of a limb". This instruction applies to the "loss of a limb" lost chance theory, which is not necessarily limited to the loss of an arm or leg but may also apply to a lost chance of recovery from cancer or spinal injury and the like.

Research References

West's Key Number Digest
Negligence ⚷1746

21.13 [1994 New] Damages—Lost Chance of Recovery (Non-Death) Cases—No Comparative Fault

If you find in favor of plaintiff, then you must determine the total amount which you believe will fairly and justly value any damages plaintiff sustained [and is reasonably certain to sustain in the future][1] as a direct result of the absence of recovery[2]. You must state such total amount in your verdict, and you must itemize that total amount by the categories of damages set forth in the verdict form.

In your verdict, you must also state, as a percentage, the chance of [recovery] [survival][3] which you find plaintiff lost. In determining the total amount of damages you must not reduce such damages by the percentage you assess as the lost chance of [recovery] [survival][3]. The judge will compute the final award by multiplying the total amount you find as damages by the percentage you assess as the lost chance of [recovery] [survival][3].

Notes on Use (1994 New)

1. This may be added if supported by the evidence.

2. The term "recovery" has reference to that recovery which could have been obtained if the negligently omitted or improper medial diagnosis or treatment had been properly rendered and had been successful. It does not necessarily mean a complete recovery. The phrase "absence of recovery," under appropriate circumstances, may be modified to expand or clarify this concept.

3. Select a term.

This is the damage instruction to be used in actions against health care providers for "loss of a limb" where no issue of plaintiff's comparative fault is submitted. See verdict form MAI 36.26.

Committee Comment (1994 New)

A. In lost chance of recovery (survival) actions, damages are determined in accordance with the method mandated by *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 684, n. 2 (Mo.banc 1992). See also §§ 538.205 *et seq.*, RSMo, for actions against health care providers.

B. During the instruction conference the parties and the court should discuss (on the record) just what damages are supported and allowed by the law and the evidence and properly can be argued to the jury. In this way arguments can proceed without undue interruption.

Research References

West's Key Number Digest
Negligence ⚷1746

21.14 [1994 New] Verdict Directing—Lost Chance of Recovery (Non-Death) Cases—Comparative Fault—Multiple Negligent Acts

In your verdict you must assess a percentage of fault to defendant *(state the name)* [whether or not *(state name of plaintiff)* was partly at fault][1] if you believe:

First, defendant *(state the name)* either:

(here set out act or omission complained of), or

(here set out alternate act or omission complained of), and

Second, *(state name of plaintiff)* then had a material chance of [survival] [recovery][2], and

Third, defendant, in any one or more of the respects submitted in paragraph First, was thereby negligent[3], and

Fourth, such negligence[3] directly caused or directly contributed to cause *(state name of plaintiff)* to lose [all] [or] [a material part of][4] such chance of [survival] [recovery][2].

* [unless you believe you must not assess a percentage of fault to defendant by reason of Instruction Number ________ *(here insert number of complete affirmative defense instruction.)*].

Notes on Use (1994 New)

1. This bracketed phrase may be used at plaintiff's option in a comparative fault case.

2. Select a term. The term "recovery" has reference to that recovery which could have been obtained if the negligently omitted or improper medical diagnosis or treatment had been properly rendered and had been successful. It does not necessarily mean a complete recovery. The term "recovery," under appropriate circumstances, may be modified to expand or clarify this concept.

3. The terms "negligent" and "negligence" must be defined. See MAI 11.06.

4. Select applicable phrase or phrases.

Paragraph Fourth is shown here modified in accordance with the first alternate of MAI 19.01.

* Add if complete affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (1994 New)

A. Where this verdict directing instruction, MAI 21.14, is used to submit a "lost chance of recovery (survival)" with comparative fault in issue, see MAI 21.15 for the damage instruction and MAI 36.27 for the verdict form.

B. See Notes on Use and Committee Comment to MAI 21.12.

Research References

West's Key Number Digest
Negligence ⚷1746

21.15 [1994 New] Damages—Lost Chance of Recovery (Non-Death) Cases—Comparative Fault

If you assess a percentage of fault to [any][1] defendant, then, disregarding any fault on the part of plaintiff, you must determine the total amount which you believe will fairly and justly value any damages plaintiff sustained [and is reasonably certain to sustain in the future][2] as a direct result of the absence of recovery.[3] You must state such total amount in your verdict, and you must itemize that total amount by the categories of damages set forth in the verdict form.

In your verdict, you must also state, as a percentage, the chance of [recovery] [survival][4] which you find *(state the name of plaintiff)* lost. In determining the total amount of damages you must not reduce such damages by the percentage you assess as the lost chance of [recovery] [survival][4].

In determining the total amount of damages, you must not reduce such amount by any percentage of fault you may assess to *(state name of plaintiff)*.

The judge will compute the final award by:

First, multiplying the amount you find as total damages by the percentage you assess as the lost chance of [recovery] [survival];[4] and

Second, making a reduction by any percentage of fault you assess to plaintiff.

Notes on Use (2002 Revision)

1. Insert if more than one defendant.

2. This may be added if supported by the evidence.

3. The term "recovery" has reference to the recovery that could have been obtained if the negligently omitted or improper medical diagnosis or treatment had been properly rendered and had been successful. It does not necessarily mean a complete recovery. The phrase "absence of recovery," under appropriate circumstances, may be modified to expand or clarify this concept.

4. Select a term.

This is the damage instruction to be used in actions against health care providers for lost chance of recovery ("lost limb") cases where plaintiff's comparative fault *is* submitted. See verdict form MAI 36.27.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

Committee Comment (1994 New)

See Committee Comment to MAI 21.13.

Research References

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22.00

VERDICT DIRECTING—OWNERS AND OCCUPIERS OF LAND

22.00 General Comment
22.01 Trespassing Children
22.02 Dangerous Condition Near Public Thoroughfare
22.03 Invitee Injured
22.04 Sidewalk Defect [Withdrawn 1993]
22.05 Tenant Injured on Premises Reserved for Common Use
22.06 Private Nuisance
22.07 Licensee
22.08 Highway Danger Created by Highway Construction Contractor
22.09 Sidewalk Defect—Dangerous Condition Created by Abutting Landowner
22.10 Constant Trespassing

Research References

West's Key Number Digest
Negligence 🔑1734, 1738

A.L.R. Library
A.L.R. Index, Negligence
West's A.L.R. Digest, Negligence 🔑1734, 1738

Legal Encyclopedias
C.J.S., Negligence §§ 987, 993

22.00 [2011 New] General Comment

Counsel should take care to distinguish between a premises liability case as set forth in this Chapter and a “general negligence” case as set forth in MAI 31.00.

Research References

West’s Key Number Digest
Negligence 🔑1734

Legal Encyclopedias
C.J.S., Negligence § 987

22.01 [1996 Revision] Trespassing Children

Your verdict must be for plaintiff if you believe:

First, defendant maintained *(here describe the condition that caused the injury)*, and

Second, defendant knew or had information from which defendant, in the exercise of ordinary care[1], should have known that children would be exposed to such condition, and

Third, defendant knew or by using ordinary care[1] could have known such condition presented an unreasonable risk of harm to children exposed to it, and

Fourth, children such as plaintiff, because of their youth, would not appreciate the risk of harm associated with such condition, and

Fifth, defendant failed to prevent plaintiff from being exposed to such harm, and

Sixth, defendant was thereby negligent[1], and

Seventh, as a direct result of such negligence[1], plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1991 Revision)

1. The terms "ordinary care," "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (2021 Revision)

A. The law on liability for injury to trespassing children is set forth in Restatement (First) of Torts § 339 (1934); *Anderson v. Cahill*, 485 S.W.2d 76 (Mo. 1972). In such cases, the law requires a finding that the possessor of land knew or had reason to know children were likely to trespass. Restatement (Second) of Torts § 339(a) (1965); *Glastris v. Union Elec. Co.*, 542 S.W.2d 65 (Mo.App. 1976).

B. Paragraph Second uses the phrase "had information from which defendant, in the exercise of ordinary care, should have known" as the equivalent of the phrase "had reason to know" as defined in Restatement (First) and (Second) of Torts § 12. The Committee has opted to use this equivalent phrase rather than "had reason to know" because it is thought that the phrase "had reason to know" may be confusing or misleading to the jury.

C. The 1995 Revision to this instruction changed the phrase "should have known" to "could have known" on the issue of constructive notice in Paragraph Third. Some MAI instructions had used one of the phrases and other instructions had used the other phrase. Questions had arisen as to whether "should have known" imposed a higher burden than "could have known". See *Benton v. City of Rolla*, 872 S.W.2d 882 (Mo.App. S.D. 1994), and *Burrell v. Mayfair-Lennox Hotels, Inc.*, 442 S.W.2d 47 (Mo. 1969). For consistency, the Committee has opted to use the phrase "could have known" to the extent possible in the context of constructive notice. Other instructions, such as MAI 10.07, paragraph Second of MAI 22.01, MAI 22.07, and MAI 25.10(A), continue to use the phrase "should have known" because that phrase is part of a "knew or had reason to know" standard as explained in the Committee Comments to those instructions.

D. Where suit involves multiple causes of damage, see MAI 19.01.

Research References

West's Key Number Digest
Negligence ⚷1734

Annotations

Description of condition	2
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1. Restatement

Attractive nuisance submission against electric utility erred in submitting failure to *insulate* wire, ignoring defense of isolating wire. *Glastris v. Union Elec. Co.*, 542 S.W.2d 65 (Mo.App. 1976).

2. Description of condition

Description of a metal ladder as a "metal device in the form of a ladder" in a jury instruction regarding attractive nuisance doctrine was not prejudicially argumentative, in as much as jury was given ample opportunity to formulate a description of the ladder in their own minds and could not have been misled by the phraseology. *Wiegers v. Fitzpatrick*, 766 S.W.2d 126, 130 (Mo.App. W.D. 1989).

22.02 [2021 Revision] Dangerous Condition Near Public Thoroughfare

Your verdict must be for plaintiff if you believe:

First, defendant [created] [maintained][1] an [excavation] *[or describe other artificial condition such as "a junk yard where broken glass, bottles, jars, and jugs were kept"]*[1], close to a public [sidewalk] [alley] [street][1], and

Second, that such [excavation] [*(or other artificial condition described)*][1] was so close to a public [sidewalk] [alley] [street][1] that persons using the [sidewalk] [alley] [street][1] would be exposed to an unreasonable risk of falling [into] [onto][1] the [excavation] [*(or other artificial condition described)*][1], and

Third, defendant knew or by using ordinary care[2] could have known of such danger, and

Fourth, defendant failed to use ordinary care[2] to [either] [barricade it] [warn of it] [remove it] [make the condition reasonably safe] [or remedy it][3], and

Fifth, as a direct result of such failure plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1991 Revision)

1. Select appropriate term.

2. The phrase "ordinary care" must be defined. See definition at MAI 11.05.

3. Select one or more of these phrases. If more than one phrase is used, they must be submitted in the disjunctive and each must be supported by the evidence. A modified submission of negligence may be used if supported by the evidence.

* Add if affirmative defense is in issue. This bracketed material

should not be used to submit comparative fault. Where comparative fault is submissible, modify this instruction in accordance with MAI 37. 01.

Committee Comment (2021 Revision)

A. Where suit is for wrongful death, see MAI 20.01 and 20.02.

B. Where suit is for loss of services or medical expenses of dependent, see MAI 31.04.

C. Where suit involves multiple causes of damage, see MAI 19.01.

D. In *Wells v. Henry W. Kuhs Realty Co.*, 269 S.W.2d 761 (Mo. 1954), plaintiff alleged that defendant maintained a "private dump" with broken bottles, jugs, etc., near a public alley; that plaintiff's child while chasing June bugs inadvertently strayed onto this dump and cut himself on the debris collected there; and that this injury caused the child's death. The trial judge sustained defendant's motion to dismiss for failure of the petition to state a claim for relief. The Supreme Court of Missouri reversed, saying:

> In these circumstances as pleaded we do not say, as a matter of law, that defendant should not be held responsible. It seems to us that facts may develop within the purview of the averments of the amended petition from which a jury could reasonably find that defendant should have realized there was a likelihood that some person, especially a child, in passing along the alley might inadvertently pass over onto defendant's land and dump, and become injured. *Supra* at 768.

E. See also Restatement (Second) of Torts §§ 368, 369 and 370 (1965). For natural conditions, see Restatement (Second) of Torts, § 840.

F. The 1995 Revision to this instruction changed the phrase "should have known" to "could have known" on the issue of constructive notice. Some MAI instructions had used one of the phrases and other instructions had used the other phrase. Questions had arisen as to whether "should have known" imposed a higher burden than "could have known". See *Benton v. City of Rolla*, 872 S.W.2d 882 (Mo.App. S.D. 1994), and *Burrell v. Mayfair-Lennox Hotels, Inc.*, 442 S.W.2d 47 (Mo. 1969). For consistency, the Committee has opted to use the phrase "could have known" to the extent possible in the context of constructive notice. Other instructions, such as MAI 10.07, paragraph Second of MAI 22.01, MAI 22.07, and MAI 25.10(A), continue to use the phrase "should have known" because that phrase is part of a "knew or had reason to know" standard as explained in the Committee Comments to those instructions.

G. See *Rhodes v. Kandlbinder*, 557 S.W.3d 502 (Mo.App. E.D. 2018) for further discussion of submissions such as "remove it", "remedy", or "make the condition reasonably safe" where a "warning" is insufficient to relieve the possessor of premises from liability.

Research References

West's Key Number Digest
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Legal Encyclopedias
C.J.S., Negligence § 993

Annotations

"Roving commission" 4
Evidentiary support 2
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1. Modification

Adding an MAI 19.01 joint tortfeasor clause to an MAI 22.02 to 22.05 type verdict director without definition of negligence "would raise a serious question" since the former uses the word "negligence" and the latter is based on failure to use "ordinary care." (See now MAI 33.15). *Chambers v. Kansas City*, 446 S.W.2d 833 (Mo. 1969).

In suit for injuries from running into a metal post in a park, plaintiff submitted a modified MAI 22.02 or 22.03 but used "exposed to danger" instead of "not reasonably safe." Not error, since "danger" and "not reasonably safe" are equivalent. *Jackson v. St. Louis*, 422 S.W.2d 45 (Mo. 1967).

Failure to modify MAI 22.02, relating to obstruction on a public sidewalk, by adding a paragraph requiring the jury to find agency of an individual who supposedly created the debris in the course of his employment for defendant, was prejudicial error where that was a contested issue. *DeLaporte v. Robey Building Supply, Inc.*, 812 S.W.2d 526 (Mo.App. E.D. 1991).

MAI 22.02 properly modified to submit negligence in obstructing highway. *Fowler v. Laclede Gas Co.*, 488 S.W.2d 934 (Mo.App. 1972).

2. Evidentiary support

Modified MAI 22.02 properly submitted defendant's liability for failing to turn off the power to a fallen transmission line. *Calderone v. St. Joseph Light & Power Co.*, 557 S.W.2d 658 (Mo.App. 1977).

Where defendant dug and later filled a hole, but it settled and caused collision, the evidence supported instruction on maintaining an *excavation. Stenson v. Laclede Gas Co.*, 553 S.W.2d 309 (Mo.App. 1977).

3. Negligence per se

Where defendant's submitted conduct was negligent per se, plaintiff's verdict director need not require a finding of negligence. *Calderone v. St. Joseph Light & Power Co.*, 557 S.W.2d 658 (Mo.App. 1977).

4. "Roving commission"

Modified pattern jury instruction did not give jury "roving commission" to find railroad liable, in negligence action against railroad that owned crossing where collision with train occurred; instruction required verdict for automobile passenger if crossing was unusually hazardous because it did not afford southbound motorists adequate sight distance to observe trains approaching from west, if railroad knew or by using ordinary care should have known of condition, if it failed to use ordinary care to warn of condition, and if such failure directly caused or contributed to cause damage to passenger. *Alcorn v. Union Pacific R.R. Co.*, 50 S.W.3d 226 (Mo.banc 2001).

22.03 [2021 Revision] Invitee Injured

Your verdict must be for plaintiff if you believe[1]:

First, there was *(here describe substance on floor that caused the fall)* on the floor of defendant's store and as a result the floor was not reasonably safe, and

Second, defendant knew or by using ordinary care[2] could have known of this condition, and

Third, defendant failed to use ordinary care[2] to [either] [remove it] [barricade it] [warn of it] [make the condition reasonably safe] [or remedy it][3], and

Fourth, as a direct result of such failure, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1989 Revision)

1. Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01. For submission of plaintiff's comparative fault for failure to keep a careful lookout, see MAI 32.28.

2. The phrase "ordinary care" must be defined. See definition at MAI 11.05.

3. Select one or more of these phrases. If more than one phrase is used, they must be submitted in the disjunctive and each must be supported by the evidence.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. See MAI 37.01.

Committee Comment (2021 Revision)

A. Where suit is for loss of services or medical expenses of dependent see MAI 31.04.

B. Where suit involves multiple causes of damage, see MAI 19.01.

C. See *Carter v. Kinney*, 896 S.W.2d 926 (Mo.banc 1995); *Harris v.*

Niehaus, 857 S.W.2d 222 (Mo.banc 1993); *Patton v. May Dept. Stores Co.*, 762 S.W.2d 38 (Mo.banc 1988); *Cox v. J.C. Penney Co., Inc.*, 741 S.W.2d 28 (Mo.banc 1987); *Hefele v. National Super Markets, Inc.*, 748 S.W.2d 800 (Mo.App. E.D. 1988); and §§ 343 and 343A(1), Restatement (Second) of Torts (1965).

D. The 1995 Revision to this instruction changed the phrase "should have known" to "could have known" on the issue of constructive notice. Some MAI instructions had used one of the phrases and other instructions had used the other phrase. Questions had arisen as to whether "should have known" imposed a higher burden than "could have known". See *Benton v. City of Rolla*, 872 S.W.2d 882 (Mo.App. S.D. 1994), and *Burrell v. Mayfair-Lennox Hotels, Inc.*, 442 S.W.2d 47 (Mo. 1969). For consistency, the Committee has opted to use the phrase "could have known" to the extent possible in the context of constructive notice. Other instructions, such as MAI 10.07, paragraph Second of MAI 22.01, MAI 22.07, and MAI 25.10(A), continue to use the phrase "should have known" because that phrase is part of a "knew or had reason to know" standard as explained in the Committee Comments to those instructions.

E. See *Rhodes v. Kandlbinder*, 557 S.W.3d 502 (Mo.App. E.D. 2018) for further discussion of submissions such as "remove it", "remedy", or "make the condition reasonably safe" where a "warning" is insufficient to relieve the possessor of premises from liability.

Research References

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Annotations

- **In general 1**
- **Contributory negligence 8**
- **Conversing 6**
- **Deviation 2**
- **Evidentiary support 7**
- **Knowledge of danger 5**
- **Modification 3**
- **Plaintiff's status 4**

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1. In general

The victim of a slip and fall may make a submissible case against the store owner upon a showing that store employees were regularly in the area in which the accident occurred. *Moss v. National Super Markets, Inc.*, 781 S.W.2d 784, 785–86 (Mo.banc 1989).

Duration of existence of defect on business premises not important with respect to self-service type store. Self-service store owner must anticipate and exercise due care to guard against dangers from articles left in the aisle, even by customers. *Sheil v. T.G. & Y. Stores Co.*, 781 S.W.2d 778, 780–82 (Mo.banc 1989).

The precise language used in jury instructions in a negligence action to define the defendant's duty or breach is not critical as long as the jury is required to find that the condition complained of presented a foreseeable risk of injury, that the defendant had actual or constructive knowledge of the risk, and that the defendant failed to remedy it. *Pierce v. Platte-Clay Elec. Co-op., Inc.*, 769 S.W.2d 769, 777 (Mo.banc 1989).

Where plaintiff's verdict director submits defendant's failure to use "ordinary care," such as MAI 22.03, Invitee Injured, defendant's converse must be in substantially the same language, and it is error to converse "negligence" since that word was not used in plaintiff's verdict director. *Brewer v. Swift & Co.*, 451 S.W.2d 131 (Mo.banc 1970).

Under MAI 22.03 (Invitee Injured) plaintiff's verdict director must specify both the ultimate facts creating a dangerous condition and that such dangerous condition made the premises not reasonably safe. *Enloe v. Pittsburgh Plate Glass Co.*, 427 S.W.2d 519 (Mo. 1968).

A modified MAI 22.04, rather than 22.03, was proper verdict director where plaintiff fell on snow-covered parking lot, and need not submit plaintiff's lack of knowledge of danger. *Carden v. Lester E. Cox Med. Center*, 519 S.W.2d 338 (Mo.App. 1975).

Omission of any essential element in plaintiff's verdict director is not cured by submission of that element in another instruction. *Brozovich v. Brozovich*, 429 S.W.2d 330 (Mo.App. 1968).

2. Deviation

Where plaintiff's (Invitee Injured) verdict director required a finding that defendant "should" have known of defect instead of "could" have known, the deviation cast a greater burden on plaintiff than required, and was harmless error. *Burrell v. Mayfair-Lennox Hotels*, 442 S.W.2d 47 (Mo. 1969).

In drawing a not-in-MAI instruction to cover a slip and fall by a servant against a master, it was error to use the formerly approved phrase "caused or permitted" since the phrase "knew . . . or could have known" is approved for slip-and-fall cases by invitees. This, because where there is no approved MAI to fit a submission, counsel shall submit the issues "in the same manner as issues are submitted in MAI." *Leathem v. Longenecker*, 405 S.W.2d 873 (Mo. 1966).

3. Modification

Adding an MAI 19.01 joint tortfeasor clause to an MAI 22.02 to 22.05 type verdict director without definition of negligence "would raise a serious question" since the former uses the word "negligence" and the latter is based on failure to use "ordinary care." (See now MAI 33.15). *Chambers v. Kansas City*, 446 S.W.2d 833 (Mo. 1969).

In suit for injuries from running into a metal post in a park, plaintiff submitted a modified MAI 22.02 or 22.03 but used "exposed to danger" instead of "not reasonably safe." No error, because "danger" and "not reasonably safe" are equivalent. *Jackson v. St. Louis*, 422 S.W.2d 45 (Mo. 1967).

In premises liability case, verdict directing instruction that was patterned after MAI 22.03 was properly modified by describing the dangerous condition as a "defect in the pipe crossing on defendant's property" and by describing the negligence of defendant as the "failure to use ordinary care to make the pipe crossing reasonably safe"; such modifications used terms and language approved in other MAI instructions. *Taylor v. Associated Elec. Co-op., Inc.*, 818 S.W.2d 669 (Mo.App. W.D. 1991).

Verdict directing instruction against public entity under premises liability provisions of V.A.M.S. § 537.600 was properly patterned after MAI 22.03 which utilizes the term "not reasonably safe" rather than the term "dangerous condition" as used in the statute. Court declined to address the issue of how a verdict directing instruction should properly submit the statutory elements of § 537.600. *Dennis v. St. Louis Board of Education*, 809 S.W.2d 20 (Mo.App. E.D. 1991).

Under circumstances of slip-and-fall case, it was necessary that instruction concerning store customer's knowledge and use of ordinary care be modified by inserting the words "in time to have avoided injury". *Robinson v. Safeway Stores, Inc.*, 655 S.W.2d 617 (Mo.App. W.D. 1983).

In slip and fall case verdict director was properly modified to describe obstacle causing fall. *Gipson v. Target Stores, Inc.*, 630 S.W.2d 107 (Mo.App. E.D. 1981).

Modification to submit failure to warn of dangerous intersecting aisles in retail store. *Blackburn v. Katz Drug Co.*, 520 S.W.2d 668 (Mo.App. 1975).

Hypothesizing evidentiary facts not error where necessary to submission of ultimate facts. *O'Connell v. Roper Elec. Co.*, 498 S.W.2d 847 (Mo.App. 1973).

Where plaintiff slipped on icy step while alighting from defendant's bus and submitted the defect, defendant's knowledge thereof and negligent failure to remedy the defect, it was not necessary further to submit that defendant had time to remedy the defect since that evidentiary fact was embraced in the element of negligence. *Swiastyn v. St. Joseph Light & Power Co.*, 459 S.W.2d 24 (Mo.App. 1970).

MAI 22.03 modified to submit "inadequately secured tar paper on the roof" instead of "substance on the floor". *Weber v. Hinds*, 440 S.W.2d 129 (Mo.App. 1969).

MAI 22.03 properly modified to submit wetslick pavement instead of "substance on the floor." *Vinyard v. Vinyard Funeral Home*, 435 S.W.2d 392 (Mo.App. 1968).

MAI 22.03 properly submitted that door check was not reasonably safe (the ultimate fact) and need not submit that it was defective because of lack of fluid (an evidentiary fact). *Jackson v. Cherokee Drug*, 434 S.W.2d 257 (Mo.App. 1968).

4. Plaintiff's status

Where status of plaintiff while visiting defendant church presented a critical factual issue of her status as an invitee or a licensee the trial court defined "invitee" and also gave an affirmative converse instruction for defendant submitting the elements of plaintiff's status as a "licensee". *Claridge v. Watson Terrace Christian Church of St. Louis*, 457 S.W.2d 785 (Mo.banc 1970).

MAI 22.03 properly modified by adding clause requiring finding of plaintiff's denied status as invitee. *Bollman v. Kark Rendering Plant*, 418 S.W.2d 39 (Mo. 1967).

Where issue of plaintiff's status as tenant or invitee depended on undisputed facts, her status was one of law for the court and not one of fact for the jury. *Friend v. Gem International, Inc.*, 476 S.W.2d 134 (Mo.App. 1971).

5. Knowledge of danger

Modified version of MAI 22.03 was properly submitted where plaintiff submitted evidence supporting the "special facts and circumstances" exception to the general rule of a property owner's non-liability for criminal conduct on its premises. *Wieland v. Owner-Operator Services, Inc.*, 540 S.W.3d 845 (Mo.banc 2018).

Store was negligent with respect to customer's slip and fall on dog food; evidence revealed that dog food had spilled in aisle earlier that evening, that dog food remained in aisle due to improper cleanup, more spilling from same source, or new spill when employee climbed bags to put away broom and dust pan, and that, due to nature of spills and their frequency, store could have taken other or additional precautions to warn or protect customers but failed to do so. *Emery v. Wal-Mart Stores, Inc.*, 976 S.W.2d 439 (Mo.banc 1998).

Injured customer in trip and fall case does not bear the burden to demonstrate she was without knowledge of the dangerous condition. Plaintiff's knowledge should no longer be submitted in the verdict directing instruction, but should be submitted by defendant under principles of comparative fault. *Patton v. May Dept. Stores Co.*, 762 S.W.2d 38, 39–40 (Mo.banc 1988).

In a suit by an invitee against a business for injuries sustained in a fall on the business premises, court erred in submitting verdict-directing instruction based on MAI 22.03, in that the second paragraph of the instruction submits issue of plaintiff's ordinary care in discovering an unsafe condition and thus is inimical to the concept of comparative fault. *Cox v. J.C. Penney Co.*, 741 S.W.2d 28 (Mo.banc 1987).

Owner liable to social guest for slip and fall only if owner has knowledge of the dangerous condition causing the fall. [2 Restatement, Law of Torts, § 342 (1934)]. *Wells v. Goforth*, 443 S.W.2d 155 (Mo.banc 1969).

Where undisputed evidence showed defendant's employee created a dangerous condition plaintiff's verdict director need not hypothesize that element. *Cline v. Carthage, etc., Co.*, 504 S.W.2d 102 (Mo. 1973).

Plaintiff-invitee's actual or constructive knowledge of danger properly submitted by a not-in-MAI contributory negligence instruction. *Cover v. Phillips Pipe Line Co.*, 454 S.W.2d 507 (Mo. 1970).

Verdict-director basing liability on defendant's negligent failure to warn plaintiff was erroneous in omitting element of plaintiff's lack of knowledge of danger. *Cover v. Phillips Pipe Line Co.*, 454 S.W.2d 507 (Mo. 1970).

Whether a defendant self-service store had actual or constructive notice of a dangerous condition on its property is a question of ultimate fact that must be included in the verdict-directing instruction in a jury-tried case. *Potter v. Hy-Vee, Inc.*, 560 S.W.3d 598 (Mo.App. S.D. 2018).

Invitee's knowledge of obvious danger was to be considered in determining invitee's comparative negligence, rather than duty of owner. *Luthy v. Denny's, Inc.*, 782 S.W.2d 661 (Mo.App. W.D. 1989).

Instruction in case involving death of worker who fell through unprotected skylight was not deficient for failure to set forth element of superior knowledge on the part of defendants of condition created by worker. *Pyle v. Prairie Farms Dairy, Inc.*, 777 S.W.2d 286, 293–94 (Mo.App. S.D. 1989).

Where deliveryman brought action for injuries sustained in slip and fall on icy sidewalk in front of supermarket, MAI 22.04 was proper instruction, because MAI 22.03 contains language concerning plaintiff's knowledge of the danger, which has been held incompatible with comparative fault.

Hefele v. National Super Markets, Inc., 748 S.W.2d 800 (Mo.App. E.D. 1988).

In slip-and-fall case defendant was entitled to its own modified contributory negligence instruction on plaintiff's contributory negligence in failing to keep a careful lookout. Refusal was error, not waived by the requirement in plaintiff's verdict director that he had neither actual nor constructive knowledge of the dangerous condition. *Wyatt v. Southwestern Bell Tel. Co.*, 573 S.W.2d 386 (Mo.App. 1978).

Plaintiff-invitee's verdict director basing recovery on defendant's failure to warn erroneously omitted plaintiff's lack of knowledge. *Crain v. Webster Electric Co-op.*, 568 S.W.2d 781 (Mo.App. 1978).

Hotel guest injured in common area need not show lack of knowledge of defect (MAI 22.05, Tenant Injured, etc.,), and court erred in requiring plaintiff to so show (MAI 22.03, Invitee Injured, etc.). Defendant could have submitted guest's contributory negligence under guest submission. *Wilder v. Chase Resorts, Inc.*, 543 S.W.2d 527 (Mo.App. 1976).

Where plaintiff was injured by cave-in of ditch where he was working, defendants' contributory negligence instruction properly hypothesized that ditch was dangerous and plaintiff had actual or constructive knowledge of danger, and plaintiff was negligent. *Koirtyohann v. Washington Plumbing & Heating Co.*, 494 S.W.2d 665 (Mo.App. 1973).

Where plaintiff was injured by shotgun while removing tools from defendant's car, plaintiff's not-in-MAI verdict director was erroneous for failure to require finding that plaintiff did not have actual or constructive knowledge of the danger. *Brozovich v. Brozovich*, 429 S.W.2d 330 (Mo.App. 1968).

6. Conversing

Where plaintiffs' verdict-director MAI 22.03 submitted defendant's failure to use ordinary care it was error to give defendant's MAI 33.02(2) conversing *negligence* since the converse was not in substantially the same language as plaintiff's verdict director. *Frogge v. Nyquist Plumbing & Ditching Co.*, 453 S.W.2d 913 (Mo.banc 1970).

7. Evidentiary support

Where plaintiff presented substantial evidence that defendant failed to remove an unsafe condition, it would be error to fail to include only "warn of it" and not also "remove it" in paragraph 3 of MAI 22.03. *Rhodes v. Kandlbinder, Inc.*, 557 S.W.3d 502 (Mo.App. E.D. 2018).

Instruction requiring jury to assess percentage of fault to store if there was ice on sidewalk, store knew of condition, store failed to used ordinary care to remove it, and patron sustained damage as result, was properly given to jury; store attempted to remove ice from sidewalk before patron fell, but ice was apparently not removed well enough to make sidewalk safe, and there was no evidence that store took any alternative approach to treating sidewalk for safety. *Gorman v. Wal-Mart Stores, Inc.*, 19 S.W.3d 725 (Mo.App. W.D. 2000).

Where plaintiff's evidence was only that she slipped on an icy step, it was error for her to hypothesize "ice and snow in the platform or steps". *Swiastyn v. St. Joseph Light & Power Co.*, 459 S.W.2d 24 (Mo.App. 1970).

8. Contributory negligence

Where plaintiff was injured by cave-in of ditch where he was working, defendants' contributory negligence instruction properly hypothesized that ditch was dangerous and plaintiff had actual or constructive knowledge of danger, and plaintiff was negligent. *Koirtyohann v. Washington Plumbing & Heating Co.*, 494 S.W.2d 665 (Mo.App. 1973).

22.04 [1993 Withdrawn] Sidewalk Defect

Historical Note

(This instruction, Notes on Use, and Committee Comment thereto are withdrawn. See MAI 31.16 and 31.17 for verdict directing instructions concerning the dangerous condition of a public entity's property. See MAI 22.09 for a verdict directing instruction against an adjoining landowner for creating or enhancing a dangerous condition on a public sidewalk).

22.05 [1981 Revision] Tenant Injured on Premises Reserved for Common Use

Your verdict must be for plaintiff if you believe:

First, there was *(here describe condition which caused the injury, such as "a hole in the stairway")* and as a result the stairway was not reasonably safe, and

Second, defendant knew, or by using ordinary care[1] could have known, of this condition, and

Third, defendant failed to use ordinary care[1] to make the stairway reasonably safe, and

Fourth, as a direct result of such failure, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1996 Revision)

1. The phrase "ordinary care" must be defined. See the definition at MAI 11.05.

This instruction assumes that the landlord-tenant relationship is not in issue.

This instruction is to be used only where the injury occurred in an area where landlord has admittedly retained possession and where plaintiff has a right to be, such as a common stairway, hall, or yard.

If there is a dispute as to whether the site of the injury was an area in landlord's control, the additional issue should be hypothesized in the following form:

Second, the stairway was in the possession and control of defendant and was used by tenants of defendant with defendant's consent.

Existing "Second" would then be renumbered "Third", etc.

* Add if affirmative defense is in issue. This bracketed material should not be used to submit comparative fault. See MAI 37.01.

Committee Comment (2021 Revision)

A. Where suit is for wrongful death see MAI 20.01 and 20.02.

B. Where suit is for loss of services or medical expenses of dependent see MAI 31.04.

C. See *Darlington v. Railway Exchange Building*, 353 Mo. 569, 183 S.W.2d 101 (1944), and *Peterson v. Brune*, 273 S.W.2d 278 (Mo. 1954).

D. The instruction may be used where plaintiff is a tenant or an invitee of tenant. "[T]he general rule is not questioned that the rights of the respondent, as invitee of the tenant . . . were co-extensive with those of the tenant . . .. In other words, if such duty was owing to the tenant, it was also owing to the respondent." *Darlington v. Railway Exchange Building,* 353 Mo. at 579, 183 S.W.2d at 105.

E. The rule is given in Restatement (Second) of Torts § 360 (1965) as follows: "A possessor of land, who leases a part thereof and retains in his own control any other part which the lessee is entitled to use as appurtenant to the part leased to him, is subject to liability to his lessee and others lawfully upon the land with the consent of the lessee or a sublessee for physical harm caused by a dangerous condition upon that part of the land retained in the lessor's control, if the lessor by the exercise of reasonable care could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe."

F. In *Roman v. King*, 289 Mo. 641, 654, 233 S.W. 161, 165 (1921), the court quoted with approval, *Home Realty Co. v. Carius*, 189 Ky. 228, 224 S.W. 751 (1920):

> It is urged that plaintiff's equal knowledge with defendant of the condition of the steps bars her right to recover herein. We cannot agree with this contention . . .. Mere continued use of a common passageway, after knowledge of its dangerous condition, is not of itself conclusive evidence of a lack of due care on the part of the tenant, since such knowledge does not require tenant to desist from using same in a careful manner, nor render the careful use of same contributory negligence.

G. In *Taylor v. Hitt*, 342 S.W.2d 489, 496 (Mo.App. 1961), the court said:

> . . . respondent's knowledge of this depression in the floor is not a defense but is of force only insofar as it bears on her contributory negligence . . .. The respondent may have had knowledge of this depression, but even so she was entitled to use this basement area provided she exercised due care in view of the hazard or unless the hazard was of such a dangerous character that no reasonable person in the exercise of due care would use the area.

H. "[P]laintiff must show that defendants had notice, actual or constructive, of the alleged defect in the common porch which was the proximate cause of plaintiff's injury." *Peterson v. Brune*, 273 S.W.2d 278, 282 (Mo. 1954).

I. An instruction which failed to require a finding that landlord had reserved and controlled the area where tenant was injured was held to be reversible error when the matter was in issue. *Fitzpatrick v. Ford*, 372 S.W.2d 844 (Mo. 1963).

J. Where suit involves multiple causes of damage, see MAI 19.01.

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1. In general

Plaintiff, who had received workmen's liability benefits from General Motors, sued defendant for dangerous condition of freight car. Submitting defendant's duty and breach made submission of "negligence" unnecessary. MAI 31.01 inappropriate. *Sampson v. Missouri Pacific R.R. Co.*, 560 S.W.2d 573 (Mo.banc 1978).

In suit by tenant's invitee against landlord the court properly gave MAI 32.01 to present the issue of plaintiff's contributory negligence in failing to keep a careful lookout; that phrase properly imposed a duty of ordinary care. *Helfrick v. Taylor*, 440 S.W.2d 940 (Mo. 1969).

In car loader's action for furnishing defective car, plaintiff's not-in-MAI verdict director properly omitted element of plaintiff's lack of knowledge of defect. (Akin to safe-place-to-work action or tenant against landlord for injury in common-use area [MAI 22.05].) *Gorman v. St. Louis-San Francisco R.R. Co.*, 427 S.W.2d 390 (Mo. 1968).

Error in dismissing claims against city was harmless, where verdict directing instruction under MAI 31.16 given on remaining claim was practically identical to instructions under MAI 22.05 and 25.10(B) from which plaintiff would have been required to choose if other claims had not been dismissed and jury returned verdict in city's favor; under circumstances, dismissal of those claims did not affect outcome of case. *Benton v. City of Rolla*, 872 S.W.2d 882 (Mo.App. S.D. 1994).

Failure of verdict directing instructions to include the language "and as a result the stairway was not reasonably safe," as applied to each disjunctive, as required by MAI 22.05, did not prejudice defendant; only logical reading of instruction assumed required wording applied to each disjunctive. *Venitz v. Creative Management, Inc.*, 854 S.W.2d 20 (Mo.App. E.D. 1993).

Hotel guest injured in common area need not show lack of knowledge of defect (MAI 22.05, Tenant Injured etc.), and court erred in requiring plaintiff to so show (MAI 22.03, Invitee Injured, etc.). Defendant could have submitted guest's contributory negligence under guest submission. *Wilder v. Chase Resorts, Inc.*, 543 S.W.2d 527 (Mo.App. 1976).

Submitting in paragraph First of MAI 22.05 that "the door closers allowed the doors to swing improperly" was proper as the ultimate fact, and the instruction properly admitted a finding that the door swung inwardly since that would be an evidentiary detail. *Blond v. Overesch*, 527 S.W.2d 663 (Mo.App. 1975).

Where there was no dispute about plaintiff's status as tenant and defendant's status as landlord in control of premises where plaintiff was injured, the trial court properly submitted plaintiff's case under MAI 22.05; the issue of status was for the court, not the jury. *Stoeppelman v. Hays-Fendler Const. Co.*, 437 S.W.2d 143 (Mo.App. 1968).

Where there was no dispute about plaintiff's status as tenant and defendant's status as landlord in control of premises where plaintiff was injured, the trial court properly submitted plaintiff's case under MAI 22.05; the issue of status was for the court, not the jury. *Stoeppelman v. Hays-Fendler Const. Co.*, 437 S.W.2d 143 (Mo.App. 1968).

2. Modification

Adding an MAI 19.01 joint tortfeasor clause to an MAI 22.02 to 22.05 type verdict director without definition of negligence "would raise a serious question" since the former uses the word "negligence" and the latter is based on failure to use "ordinary care." (See now MAI 33.15). *Chambers v. Kansas City*, 446 S.W.2d 833 (Mo. 1969).

Plaintiff passenger sued for slip and fall injuries, hypothesizing accumulated water on floor of bus when it left yard. This submission was not supported by evidence of water on floor at time of fall. *Blase v. Bi-State Dev. Agency*, 503 S.W.2d 463 (Mo.App. 1973).

Modified MAI 22.05 (Injury to Tenant in Common-Use Area) submitting injury to child playing on abandoned automobile. *Rawson v. Ellerbrake*, 423 S.W.2d 14 (Mo.App. 1967).

3. Plaintiff's status

Where issue of plaintiff's status as tenant or invitee depended on undisputed facts, her status was one of law for the court and not one of fact for the jury. *Friend v. Gem International, Inc.*, 476 S.W.2d 134 (Mo.App. 1971).

4. Evidentiary support

In employee's negligence suit against employer's landlord, evidence did not establish as matter of law that areas in which employee was injured were common areas subject to landlord's control, so that jury instruction on determination of common areas was properly given; both landlord's and employer's employees used same entrances, exits, and parking lot, and shared same restrooms and lunchroom, lease did not specify which areas were conveyed to employer, and all parts of building were available equally to landlord and employer. *Caples v. Earthgrains Co.*, 43 S.W.3d 444 (Mo.App. E.D. 2001).

Even though landlord had made repairs to premises before employee's injuries, employee injured on employer's leased premises failed to present sufficient evidence to make submissible jury issue regarding landlord's duty to repair in negligence action brought against landlord; lease allowed landlord limited access to premises to make repairs, and there was no evidence that landlord entered premises on its own initiative to make repairs. *Caples v. Earthgrains Co.*, 43 S.W.3d 444 (Mo.App. E.D. 2001).

Invitee's knowledge that steps between parking levels were dangerous did not absolve landlords from liability for fall as result of top step falling away when invitee stepped on it; danger was not so apparent or so great that it was unreasonable for invitee to encounter it, and invitee's actions appeared no less wary than caution of reasonable person under the same circumstances. *Gregg v. Erb*, 834 S.W.2d 253 (Mo.App. E.D. 1992).

Conjunctive submissions of negligence in maintaining defective screen door and defective porch railing erroneous absent evidence to support each submission. *Woods v. Gould*, 515 S.W.2d 592 (Mo.App. 1968).

5. Landlord's Control

Where the issue of the landlord's control is in dispute, the question of whether the landlord retained sufficient control over the area where the tenant's injury occurred is a question for the trier of fact in a premises liability case, and the addition of language addressing this issue to MAI 22.05 is appropriate. *Stephenson v. Countryside Townhomes, LLC*, 437 S.W.3d 380 (Mo.App. E.D. 2014).

22.06 [1969 New] Private Nuisance

Your verdict must be for plaintiff if you believe:

First, plaintiff used plaintiff's property as a residence, and

Second, *(here describe nuisance such as "defendant operated a slaughter house in close proximity to plaintiff's residence")* and

Third, *(here describe the injury such as "ill-smelling odors escaped from defendant's premises onto plaintiff's property and this substantially impaired plaintiff's use of his property,")* and

Fourth, such use by defendant of defendant's property was unreasonable.

* [unless you believe that plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1991 Revision)

* Add if affirmative defense is submitted.

Committee Comment (2021 Revision)

A. This instruction has limited application. It should not be used except where the facts show the doctrine of private nuisance is applicable.

B. "Private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. Restatement (Second) of Torts, § 821D (1977)." *Sofka v. Thal*, 662 S.W.2d 502, 508 (Mo.banc 1983).

C. This instruction is intended for use only when a nuisance is created after plaintiff has the right of enjoyment.

D. If the nuisance already exists when plaintiff acquires his possessory rights, then different doctrines variously called "priority of occupation" and "coming to the nuisance" may apply. For mention of "priority of occupation," *see Fuchs v. Curran Carbonizing & Engineering Co.*, 279 S.W.2d 211, 218 (Mo.App. 1955).

E. The common law private nuisance action, "an action for trespass on the case for nuisance," is discussed in *Smiths v. McConathy*, 11 Mo. 517 (1848). That case accords with the above instruction. The report speaks to the instruction's lack of a "directly damage" paragraph. Damage from a private nuisance is presumed (not so in public nuisance) from the mere proof of the nuisance, *id.*, 522:

> In an action for a private nuisance it is not necessary to allege or prove any special damage. * * * But if a private nuisance be alleged and proved, the plaintiff is allowed to recover nominal damages at least, whatever amount of inconvenience or injury may have been occasioned by it.

F. In justification of the principle, *see id.*, 523:

> When we look at the nature of most of the private nuisances spoken of in the books, we cannot fail to perceive the propriety of allowing a recovery upon the mere proof of the existence of the nuisance. Take the case of a smith's forge, a privy or a lime-kiln, (all of which are frequently spoken of as nuisance), erected so near a dwelling house as to render it unfit for habitation. How could the plaintiff establish any special damage resulting from the erection of such nuisance? If a pecuniary loss be the criterion of special damage, the most intolerable nuisances would be without redress.

G. For a more recent discussion where the facts failed, as a matter of law, to constitute a nuisance, *see Sofka v. Thal, supra.*

H. Where suit involves multiple causes of damage, see MAI 19.01.

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1. In general

Pre-MAI verdict director on private nuisance approved and compared with MAI 22.06. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970).

Fact that jury instruction on nuisance used different language to describe the nuisance at issue than what was used in the model jury instruction did not mean that the instruction was modified; not every nuisance claim is based on the theory that the "defendant operated a slaughter house in close proximity to plaintiff's residence" as used in the model instruction, and it would make no sense that each and every time that the trial court did not use the identical, hypothetical descriptive language of the model instruction in order to track the evidence presented at trial, the law would consider the instruction a "modification" of an approved instruction. *McGuire v. Kenoma, LLC*, 375 S.W.3d 157 (Mo.App. W.D. 2012).

A description of the injury in the third paragraph of MAI 22.06 which allowed the jury to find that the nuisance caused by PSF's hog operation was the result of either "ill-smelling odors or other emissions" was permissible where there was evidence that emissions which escaped from the defendant's hog operation into the air were at times less odorous or non-odorous. *Owens v. ContiGroup Companies, Inc.*, 344 S.W.3d 717 (Mo.App. W.D. 2011).

In action for damages from increased flow of surface water from construction of store and parking lot on adjacent tract, verdict-directing instruction, based on MAI 22.06 and allegedly including evidentiary details rather than ultimate facts, was not erroneous; defendant did not argue that any fact hypothesized in the instruction lacked evidentiary support, and did not explain how the instruction was prejudicial. *Farley v. Wappapello Foods, Inc.*, 959 S.W.2d 888 (Mo.App. S.D. 1997).

Jury verdict assessing punitive damages in action for interference with easement did not cure erroneous jury instruction which omitted element that interference had to be unreasonable because willful and wanton is not the same as unreasonable. *Gilbert v. K.T.I., Inc.*, 765 S.W.2d 289, 296–97 (Mo.App. W.D. 1988).

In action seeking damages for interference with easement, jury should not have been instructed based on ejectment damage instruction MAI 27.03. Liability for damages caused by interference or obstruction of easement is based upon nuisance instruction MAI 22.06. *Gilbert v. K.T.I., Inc.*, 765 S.W.2d 289, 294, 297 (Mo.App. W.D. 1988).

MAI 22.06 is the proper verdict director for all nuisances, intentional and nonintentional, temporary or permanent. *Fletcher v. City of Independence*, 708 S.W.2d 158 (Mo.App. W.D. 1986).

2. Nominal damages

It is not necessary to plead nominal damages in order to recover them in a nuisance action, and a plaintiff is entitled to nominal damages if he proves nuisance but fails to, or cannot, prove actual damage. *Wallace v. Grasso*, 119 S.W.3d 567 (Mo.App. E.D. 2003).

3. Modification

Modification of MAI 22.06 to include the word "farm" did not erroneously state the law because non-economic damages are allowed for business properties. *Owens v. ContiGroup Companies, Inc.*, 344 S.W.3d 717 (Mo.App. W.D. 2011).

22.07 [1991 Revision] Licensee

Your verdict must be for plaintiff if you believe[1]:

First, there was *(here describe the condition which caused the injury)* on defendant's premises and as a result the premises were not reasonably safe, and

Second, defendant knew of this condition and knew that such condition was not reasonably safe, and

Third, defendant knew or had information from which defendant, in the exercise of ordinary care[2], should have known that persons such as plaintiff would not discover such condition or realize the risk of harm, and

Fourth, defendant failed to use ordinary care[2] to [either] [make the condition reasonably safe] [or adequately warn of it],[3] and

Fifth, as a direct result of such failure, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1991 Revision)

1. Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01. For submission of plaintiff's comparative fault with respect to failure to keep a careful lookout, see MAI 32.28.

2. The phrase "ordinary care" must be defined. See definition at MAI 11.05.

3. Select one or both phrases. If both phrases are used, they must be submitted in the disjunctive and each must be supported by the evidence.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (2021 Revision)

A. In *Wells v. Goforth*, 443 S.W.2d 155, 158 (Mo.banc 1969), the

Court adopted the rule stated in Restatement (First) of Torts § 342 (1934) imposing liability upon a possessor of land toward a gratuitous licensee only upon proof of the defendant's actual knowledge of the offending condition.

B. See *Carter v. Kinney*, 896 S.W.2d 926 (Mo.banc 1995); *Harris v. Niehaus*, 857 S.W.2d 222 (Mo.banc 1993); *Cox v. J.C. Penney, Inc.*, 741 S.W.2d 28 (Mo.banc 1987); *Nichols v. Koch*, 741 S.W.2d 87 (Mo.App. E.D. 1987); and Restatement of Torts (Second) § 342 (1965).

C. Paragraph Third uses the phrase "had information from which defendant, in the exercise of ordinary care, should have known" as the equivalent of the phrase "had reason to know" as defined in Restatement (First) and (Second) of Torts § 12. The Committee has opted to use this equivalent phrase rather than "had reason to know" because it is thought that the phrase "had reason to know" may be confusing or misleading to the jury.

D. Where suit involves multiple causes of damages, see MAI 19.01.

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1. In general

The MAI instructions for premises liability are applicable in negligence cases where the cause of the injury or damage was an unsafe or defective condition of the property itself. *Nagaragadde v. Pandurangi*, 216 S.W.3d 241 (Mo.App. W.D. 2007).

Homeowner's failure to extinguish an oil ceremonial prayer lamp could not be considered a defective condition of the property itself, and thus, simple negligence instruction, patterned after MAI 17.01, as opposed to instruction on landowner or premises liability, was appropriate to direct the jury's verdict in negligence action brought against homeowner by guest, who was severely burned when her sari caught fire when it came in contact with ceremonial prayer lamp's flame in home of homeowner. *Nagaragadde v. Pandurangi*, 216 S.W.3d 241 (Mo.App. W.D. 2007).

Evidence that road on which motorcyclist was injured was a private road rather than a public road supported jury instruction concerning landowner's liability arising from injuries occurring on his or her property, although motorcyclist's first amended petition alleged that road was a public street. *Wilson v. Kaufmann*, 847 S.W.2d 840 (Mo.App. E.D. 1992).

In motorcyclist's negligence action against landowner arising when motorcyclist struck earthen mound constructed by landowner at end of private road, it was error to omit the element of MAI 22.07 requiring a finding that the landowner knew or should have known that people using the road would not discover the dangerous condition; but this error was waived where landowner did not raise this omission either at trial or in motion for new trial. *Wilson v. Kaufmann*, 847 S.W.2d 840 (Mo.App. E.D. 1992).

2. Knowledge of danger

MAI 22.07 was properly modified in accordance with comparative fault principles by deleting the portion of the instruction which directed the jury to consider whether plaintiff, in the exercise of ordinary care, could have known of the condition which caused injury.

Gillis v. Collins, 770 S.W.2d 503, 505 n. 1 (Mo.App. W.D. 1989).

3. Status of plaintiff

In suit brought by guest against property owner for injuries she sustained when she fell on front porch of owner's residence, guest was entitled to duty of care owed to licensee, despite guest's contention that preparation of food in connection with picnic transformed her into invitee. *Gillis v. Collins*, 770 S.W.2d 503, 506 (Mo.App. W.D. 1989).

22.08 [1978 New] Highway Danger Created by Highway Construction Contractor

Your verdict must be for plaintiff if you believe:

First, defendant *(describe the conduct creating the dangerous condition relied upon, such as, "removed the stop sign")* and as a result the [sidewalk] [street] [highway][1] was not reasonably safe for the public, and

Second, defendant failed to use ordinary care[2] to [remedy] [warn of][3] such unsafe condition, and

Third, as a direct result of such failure, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1990 New)

1. Select appropriate term.

2. The phrase "ordinary care" must be defined. See definitions in Chapter 11.00.

3. Select appropriate term or phrase.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. See MAI 37.01.

Committee Comment (2021 Revision)

A. For elements of liability of a private contractor see *Morris v. Israel Brothers, Inc.*, 510 S.W.2d 437 (Mo. 1974), and *Fowler v. Laclede Gas Co.*, 488 S.W.2d 934 (Mo.App. 1972).

B. Where suit involves causes of damage, see MAI 19.01.

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C.J.S., Negligence § 993

22.09 [1993 New] Sidewalk Defect—Dangerous Condition Created by Abutting Landowner

Your verdict must be for plaintiff if you believe[1]:

First, *(here describe condition that made the sidewalk dangerous, such as "there was oil on the sidewalk" or "there was a hole in the sidewalk")*, and as a result the sidewalk was not reasonably safe for the public, and

Second, [such condition was created by defendant] [defendant made a special use of the sidewalk which increased the danger of such condition][2], and

Third, defendant was thereby negligent[3], and

Fourth, as a direct result of such negligence[3], plaintiff sustained damage.

*[unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of complete affirmative defense instruction)*].

Notes on Use (1993 New)

1. Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01. For submission of plaintiff's comparative fault for failure to keep a careful lookout, see MAI 32.28.

2. Select the appropriate alternative.

3. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

* Add if complete affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (2021 Revision)

A. Where suit is for wrongful death, see MAI 20.01 and 20.02.

B. Where suit is for loss of services or medical expenses of a dependent, see MAI 31.04.

C. The general rule in Missouri is that the affirmative duty to maintain public sidewalks rests on the municipality and does not require an abutting property owner to repair or maintain a public sidewalk. See *Rauh v. Interco, Inc.*, 702 S.W.2d 497 (Mo.App. E.D. 1985). Two standard exceptions to this general rule exist where the abutting property owner: 1) enhanced the danger of the condition by making a special purpose use of the sidewalk or 2) has artificially created a condition which makes passage thereon unsafe. See *Martin v. Gilmore*, 358 S.W.2d 462 (Mo.App. 1962).

D. *Harris v. Woolworth*, 824 S.W.2d 31 (Mo.App. E.D. 1991), held that a verdict directing instruction against an adjoining landowner was deficient where the verdict director failed to hypothesize that the adjoining owner created a dangerous condition in an alley by spilling kitchen grease. See the *Harris* case for further discussion of an adjoining landowner's responsibility for creating a dangerous condition on a public way (street, sidewalk, alley) or enhancing a dangerous condition by making a special use of the public way.

E. Where suit is against a public entity for a dangerous condition of a public entity's property, see MAI 31.16 and 31.17.

F. Where suit involves multiple causes of damage, see MAI 19.01.

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1. In general

Using "was in an unsafe and dangerous condition for travel thereon by the public" not error since it was equivalent to "was not reasonably safe for the public." (See *Jackson v. St. Louis*, 422 S.W.2d 45.) *Courtney v. City of Ferguson*, 401 S.W.2d 172 (Mo.App. 1966).

Verdict-directing instruction requiring jury to find that soybean processing facility had created a hazardous condition because its parking lot had not been available for use by trucks waiting on public street to enter facility was appropriate, in child's negligence action against facility arising out of incident in which child, when exiting his driveway on to public street on his bicycle to deliver newspapers, was struck by tractor-trailer; instruction tracked provisions of pattern instruction for dangerous condition created by abutting landowner, and facility's other actions giving rise to duty were not disputed facts, and thus were not required to be hypothesized in instruction. *Boggs ex rel. Boggs v. Lay*, 164 S.W.3d 4 (Mo.App. E.D. 2005).

Modification of jury instruction regarding liability of landowner arising from injuries occurring on landowner's property to encompass theory that landowner constructed and knowingly maintained obstruction at end of private drive and failed to provide adequate lighting in such location did not improperly convert injured motorcyclist's theory from one of premises liability to one of abutting landowner's liability for dangerous condition on public roadway or sidewalks. *Wilson v. Kaufmann*, 847 S.W.2d 840 (Mo.App. E.D. 1992).

Verdict directing instruction in slip and fall action, based on MAI 22.04, was erroneous for failing to hypothesize that adjacent property owner was responsible for the presence of the dangerous condition in adjacent alley. *Harris v. Woolworth (F.W.)*, 824 S.W.2d 31 (Mo.App. E.D. 1991).

2. Modification

MAI modification which submits unnecessary evidentiary details creates error because undue emphasis of evidence, confusion and other unfairness which favor one litigant above the other can result. Modification of MAI 22.04 to submit case to recover for injuries sustained when plaintiff fell through bridge not error. *Hall v. County of New Madrid*, 645 S.W.2d 149 (Mo.App. S.D. 1982).

3. Knowledge of danger

Where deliveryman brought action for injuries sustained in slip and fall on icy sidewalk in front of supermarket, MAI 22.04 was proper instruction, because MAI 22.03 contains language concerning plaintiff's knowledge of the danger, which has been held incompatible with comparative fault. *Hefele v. National Super Markets, Inc.*, 748 S.W.2d 800 (Mo.App. E.D. 1988).

22.10 [2006 New] Constant Trespassing

Your verdict must be for plaintiff if you believe:

First, defendant knew or had information from which defendant, in the exercise of ordinary care[1], should have known that trespassers constantly intruded on *(here describe the limited area of land on which trespassing occurred)*, and

Second, defendant [maintained][created][2] *(here describe the artificial condition that caused the injury)*, and

Third, defendant knew that such condition was likely to cause death or serious bodily harm to trespassers, and

Fourth, defendant knew or had information from which defendant, in the exercise of ordinary care,[1] should have known that trespassers would not discover such condition, and

Fifth, defendant failed to exercise ordinary care[1] to warn such trespassers of the condition and the risk involved, and

Sixth, as a direct result of such failure, plaintiff sustained damage.

*[unless you believe plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes On Use (2006 New)

1. The phrase "ordinary care" must be defined. See the definition at MAI 11.05.

2. Select appropriate term.

Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01.

*Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. See MAI 37.01.

Committee Comment (2021 Revision)

A. The law on liability to constant trespassers is set forth in Restatement (Second) of Torts § 335 (1965), which was expressly adopted in *Humphrey v. Glenn*, 167 S.W.3d 680, 684 (Mo.banc 2005).

B. Section 335 provides that:

> A possessor of land who knows, or from facts within his knowledge should know, that trespassers constantly intrude upon a limited area of land, is subject to liability for bodily harm caused to them by an artificial condition on the land, if
>
> (a) the condition
>
> (i) is one which the possessor has created or maintains, and
>
> (ii) is, to his knowledge, likely to cause death or serious bodily harm to such trespassers, and
>
> (iii) is of such a nature that he has reason to believe that such trespassers will not discover it, and
>
> (b) the possessor has failed to exercise reasonable care to warn such trespassers of the condition and the risk involved.

Restatement (Second) of Torts § 335.

C. Where suit involves multiple causes of damage, see MAI 19.01.

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23.01 Assault
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23.13 Retaliatory Discharge or Discrimination-Worker's Compensation [Withdrawn 2012]
23.14 Employee's Breach of Duty of Loyalty

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A.L.R. Library

A.L.R. Index, Assault and Battery; Conversion; False Imprisonment and Arrest; Interference with Contract; Libel and Slander; Malicious Prosecution

West's A.L.R. Digest, Assault and Battery 🔑43(1); False Imprisonment 🔑40; Fraud 🔑65(1); Labor and Employment 🔑111, 140(3), 1993; Libel and Slander 🔑124(1); Malicious Prosecution 🔑72(1); Torts 🔑10; Trover and Conversion 🔑67

Legal Encyclopedias

Am. Jur. 2d, Assault and Battery § 75; False Imprisonment § 132; Libel and

Slander § 486

C.J.S., Assault § 61; Employer-Employee Relationship §§ 91, 150, 152; False Imprisonment § 74; Malicious Prosecution or Wrongful Litigation § 138; Torts § 107

23.01 [1981 Revision] Assault

Your verdict must be for plaintiff if you believe:

First, defendant *(here describe act such as "pointed a gun at plaintiff")* with the intent to cause plaintiff *(or if some other person here describe such person)* [offensive contact] [bodily harm] [apprehension of offensive contact] [apprehension of bodily harm],[1] and

Second, defendant thereby caused plaintiff to be in apprehension of [bodily harm] [offensive contact].[1]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1981 Revision)

1. Select the appropriate bracketed phrase or phrases. If more than one phrase is submitted, they should be submitted in the disjunctive.

* Add if affirmative defense is submitted.

Committee Comment (2012 Revision)

A. Where agency is in issue see MAI 18.01.

B. Cases of assault not accompanied with a battery are quite rare in Missouri. The elements of the offense were described in *Hickey v. Welch*, 91 Mo.App. 4, 14 (1901), as follows: "An assault is an inchoate battery. The wrong is putting a person in present fear of violence, so that any act fitted to have that effect on a reasonable man is an assault . . .. Witnesses swore defendant pointed a pistol at plaintiff and threatened to shoot her, and likewise raised a shotgun in a menacing way. Those acts were an assault."

C. See generally Restatement (Second) of Torts §§ 21 to 34 (1965). It is there pointed out that words alone do not constitute an assault.

D. Provocation by plaintiff can serve to mitigate or defeat plaintiff's right to punitive damages. See *Fordyce v. Montgomery*, 424 S.W.2d 746 (Mo.App. 1968).

Research References

West's Key Number Digest
Assault and Battery ⚷43(1)

Legal Encyclopedias
C.J.S., Assault § 61

23.02 [1990 Revision] Battery

Your verdict must be for plaintiff if you believe:

First, defendant intentionally *(here describe act such as "struck")* plaintiff, and

Second, defendant thereby caused plaintiff bodily harm.[1,2]

* [unless you believe that plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1990 Revision)

1. If the battery is an offensive touching, substitute the following for paragraph Second:

Second, defendant thereby caused a contact with plaintiff which was offensive to plaintiff, and

Third, such contact would be offensive to a reasonable person.

2. If the battery arises out of a claim that a public official, such as a police officer or jailer, used excessive force in his official duties, substitute the following for paragraph Second:

Second, defendant thereby used more force than was reasonably necessary, and

Third, defendant thereby caused plaintiff bodily harm.

* Add if affirmative defense is submitted.

Committee Comment (1996 Revision)

A. Where agency is in issue, see MAI 18.01.

B. Where suit involves multiple causes of damages, see MAI 19.01.

C. Where suit is for loss of services or medical expenses of dependents, see MAI 31.04.

D. See Restatement (First) of Torts §§ 13 to 20 (1934); *Adler v. Ewing*, 347 S.W.2d 396, 402 (Mo.App. 1961); *Carnes v. Thompson*, 48 S.W.2d 903 (Mo. 1932).

E. For an example of recovery for offensive touching, see *Edmisten v. Dousette*, 334 S.W.2d 746 (Mo.App. 1960).

F. The Restatement takes no position on whether one is liable if that person inflicts upon another a contact which that person knows to be offensive to the other because of abnormal sensitivity.

G. Provocation by plaintiff can serve to mitigate or defeat plaintiff's right to punitive damages. See *Fordyce v. Montgomery*, 424 S.W.2d 746 (Mo.App. 1968).

H. If defendant is a public official possessing legal right to touch plaintiff, plaintiff must modify MAI 23.02 to accept burden of proving defendant used more force than was reasonably necessary. See *Neal v. Helbling*, 726 S.W.2d 483 (Mo.App. E.D. 1987).

Research References

West's Key Number Digest
Assault and Battery ⚷43(1)

Legal Encyclopedias
C.J.S., Assault § 61

Annotations

In general 1
Affirmative defense 2

1. In general

Where arresting police officers were defendants, fact of use of unreasonable force was an element of plaintiff's case and required modification of MAI 23.02. *Neal v. Helbling*, 726 S.W.2d 483 (Mo.App. E.D. 1987).

Where plaintiff's substantive right arose from defendant's deliberately shooting him, it was error to refuse MAI 23.02 (battery, an intentional act) and to give instead modified MAI 17.01 (negligent act). *Martin v. Yeoham*, 419 S.W.2d 937 (Mo.App. 1967).

2. Affirmative defense

It was proper for trial court to modify MAI 23.02 to refer to instruction on asserted affirmative defense of merchant's privilege to detain a suspected shoplifter. *Barkley v. McKeever Enterprises, Inc.*, 456 S.W.3d 829 (Mo.banc 2015).

Where defendant *shot* plaintiff, Paragraph First of his self-defense instruction should be modified to require a finding defendant believed he was in imminent danger of death or great bodily harm. *Martin v. Yeoham*, 419 S.W.2d 937 (Mo.App. 1967).

23.03 [1965 New] Battery—Intent to Induce Apprehension

Your verdict must be for plaintiff if you believe:

First, defendant with the intent to place plaintiff *(or if intention was directed to some other person, substitute that person's name for plaintiff)* in apprehension of bodily harm *(here describe acts such as "struck plaintiff")*, and

Second, defendant thereby caused plaintiff bodily harm.[1]

* [unless you believe that plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1990 Revision)

1. If the battery is an offensive touching, see the modification of paragraph Second in Note on Use 1 of MAI 23.02.

* Add if affirmative defense is submitted.

Committee Comment (1996 Revision)

A. Where agency is in issue, see MAI 18.01.

B. Where suit involves multiple causes of damages see MAI 19.01.

C. Where suit is for loss of services or medical expenses of dependent see MAI 31.04.

D. See Restatement (First) of Torts § 13, Comment (d) and § 18 (1934). See also, *Robbs v. Missouri Pac. Ry. Co.*, 210 Mo.App. 429, 242 S.W. 155 (1922).

E. Provocation by plaintiff can serve to mitigate or defeat plaintiff's right to punitive damages. See *Fordyce v. Montgomery*, 424 S.W.2d 746 (Mo.App. 1968).

Research References

West's Key Number Digest
Assault and Battery ⚷43(1)

23.04 [1983 Revision] False Imprisonment

Your verdict must be for plaintiff if you believe:

Defendant intentionally [restrained] [instigated the restraint of][1] plaintiff against plaintiff's will.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 Revision)

1. Select the appropriate phrase.

* Add if affirmative defense is submitted.

Committee Comment (2012 Revision)

A. Although similar in some respects, the elements of a claim for false imprisonment are different from those of a claim for malicious prosecution. See MAI 23.07 for submission of malicious prosecution.

B. False Imprisonment occurs when there is a "confinement, without legal justification, by the wrongdoer of the person wronged." *Highfill v. Hale*, 186 S.W.3d 277, 280 (Mo.banc 2006); See also, *Gibbs v. Blockbuster, Inc.*, 318 S.W.3d 157 (Mo.App. E.D. 2010). A person may be liable for false imprisonment if that person knowingly encourages, causes, promotes, or instigates the arrest of another, such as providing information that forms the basis of a subsequent unlawful arrest. *Highfill,* 186 S.W.3d at 280. A person who merely states facts to a law enforcement officer, while leaving it to the officer's discretion to act on such information, is not liable for false imprisonment. *Highfill,* 186 S.W.3d at 280. And "no action for false imprisonment may be maintained for an arrest which is lawful, no matter at whose instigation nor for what motive the arrest was made." *Routh v Burlington Northern R.R. Co.*, 708 S.W.2d 211, 216 (Mo.App. W.D. 1986).

C. In cases involving detention by a merchant, see § 537.125, RSMo.

Research References

West's Key Number Digest
False Imprisonment ⚷40

Legal Encyclopedias
C.J.S., False Imprisonment § 74

Annotations

In general 1

Agency in issue 2

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1. In general

Malice is not an element of false imprisonment. *Wilton v. Cates*, 774 S.W.2d 570, 573 (Mo.App. W.D. 1989).

MAI 23.04 (verdict director) and MAI 28.10 [Now 32.13] (affirmative defense) properly submitted case of customer's arrest by off-duty policeman working as defendant's security officer. *Nelson v. R.H. Macy & Co.*, 434 S.W.2d 767 (Mo.App. 1968).

2. Agency in issue

Verdict director for false arrest based on agency (MAI 18.01 to 23.04) required definition of scope of employment (MAI 13.02). *Peak v. W.T. Grant Co.*, 409 S.W.2d 58 (Mo.banc 1966).

23.05 [2007 Revision] Fraudulent Misrepresentations—Pecuniary Loss

Your verdict must be for plaintiff if you believe:

First, defendant *(describe act such as "represented to plaintiff that the motor vehicle was never in an accident")*, and

Second, such representation was made by defendant with the intent that plaintiff rely on such representation in *(purchasing the motor vehicle)*, and

Third, the representation was false, and

Fourth, [defendant knew that it was false] [defendant knew that it was false at the time the representation was made] [defendant made the representation without knowing whether it was true or false][1], and

Fifth, the representation was material to the *(purchase of the motor vehicle)*, and

Sixth, plaintiff relied on the representation in *(making the purchase)*, and such reliance was reasonable under the circumstances, and

Seventh, as a direct result of such representation, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (2016 Revision)

1. Select the appropriate phrase. The second alternate for Paragraph Fourth is required to submit a misrepresentation of a future event. *Stevens v. Markirk Construction, Inc.*, 454 S.W.3d 875 (Mo.banc 2015). The third alternate is not appropriate for submission of a misrepresentation of a future event. See *Klecker v. Sutton*, 523 S.W.2d 558 (Mo.App. 1975), and *Wolk v. Churchill*, 696 F.2d 621 (8th Cir. 1982).

* Add if affirmative defense is submitted.

Committee Comment (2016 Revision)

A. For negligent misrepresentations, see MAI 31.26.

B. Where agency is in issue, see MAI 18.01.

C. *Wengert v. Thomas L. Meyer*, 152 S.W.3d 379 (Mo.App. E.D. 2004) involves negligent failure to disclose a water drainage problem. This instruction should not be used to submit a misrepresentation by omission (fraudulent or negligent) contemplated by Restatement (Second) Torts § 551.

D. For a discussion of the distinction between negligent misrepresentation and reckless disregard for truth or falsity (as submitted by MAI 23.05), see *Colgan v. Washington Realty*, 879 S.W.2d at 689, n. 1 (Mo.App. E.D. 1994).

E. The Restatement (Second) Torts distinguishes between misrepresentations that cause pecuniary loss (§ 551 and § 552) and those that result in physical injury (§ 311). MAI 23.05 and MAI 31.26 are intended to apply to "pecuniary loss" cases.

F. The elements of an action for fraudulent representation are listed in *John T. Brown, Inc. v. Weber Implement & Auto Co.*, 260 S.W.2d 751, 755 (Mo. 1953), as follows:

> It was essential to a recovery to establish a representation; its falsity; its materiality; the speaker's knowledge of its falsity; his intent that it be acted on by the hearer and in the manner reasonably contemplated; that hearer's ignorance of its falsity; his reliance on its truth; his right to rely thereon; and his consequent and proximate injury. A failure to establish any one of these elements is fatal to a recovery.

G. See also *Joel Bianco Kawasaki Plus v. Meramec Valley Bank*, 81 S.W.3d 528, 536 (Mo.banc 2002).

H. To recover for fraudulent representations, it is not necessary that it be shown that defendant had actual knowledge of the falsity of the facts stated by defendant (except for a misrepresentation as to a future event). It is sufficient that representations are made with the consciousness that they were made without knowledge as to truth or falsity, when in fact, they were false. See *Wilson v. Murch*, 354 S.W.2d 332, 338 (Mo.App. 1962). However, if a verdict directing instruction submits in the alternative that defendant knowingly made false representations and that defendant made the representations without knowing whether they were true or false, there must be evidence to support both theories. See *Emily v. Bayne*, 371 S.W.2d 663 (Mo.App. 1963).

I. Although the basic elements of fraudulent misrepresentation have long been settled and a plaintiff must show a right to rely on the misrepresentation, more recent case law puts less emphasis on the "duty to investigate." In *Orlann v. Laederich*, 338 Mo. 783, 791, 92 S.W.2d 190, 194 (1936), the Court quotes from *McCaw v. O'Malley*, 298 Mo. 401, 249 S.W. 41, 44 (1923), which said: ". . . the burden is upon the plaintiff . . . to establish by proof that there was not only a false representation, but that he relied upon it, and that such reliance 'was an act of ordinary, prudence', and that such representations thus prudently relied upon influenced plaintiff to his damage." This language has never been expressly overruled although it seems to have been tempered by later cases.

J. In *Meyer v. Brown*, 312 S.W.2d 158, 161 (Mo.App. 1958), the court quoted with approval 37 CJS Fraud § 34, pp. 279–80:

> "However, the mere presence of opportunities for investigation will not of itself preclude the right of reliance; and this is especially true where the circumstances were such that a prudent man would not have been put on inquiry, as where positive statements were made in a manner not calculated to cause inquiry, where the relations between the parties were involuntary, where, although it was possible to ascertain the facts, an investigation would have been difficult, or where there was intentional fraud, as where the representations were made for the very purpose of preventing inquiry; . . ."

K. In *Shechter v. Brewer*, 344 S.W.2d 784, 788 (Mo.App. 1961), the court said: "The tendency of modern decisions is not to extend, but to restrict the rule requiring diligence, and similar rules, such as *caveat emptor*, and the rule granting immunity for dealers talk; to condemn the falsehood of the fraud feasor rather than the credulity of his victim . . . Since the very purpose of fraud is to cheat its victim by making him neglect the care essential to prevent injury, to deny relief because the victim was negligent would encourage the evil."

L. See also *Keefhaver v. Kimbrell*, 58 S.W.3d 54 (Mo.App. W.D. 2001), which discusses the duty to investigate in the context of the sale of a home and which also deals with the issue of misrepresentation by silence or concealment where the silent party has a duty to speak.

M. Restatement (Second) of Torts § 541 (1977) expresses the rule as follows: The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him."

Cases involving multiple misrepresentations.

N. Submission of multiple representations in a single verdict directing instruction may create a problem in determining whether all requisite elements (i.e., falsity, materiality, knowledge, etc.) have been found as to the same representation. A possible approach would be to submit a separate verdict directing instruction as to each alleged misrepresentation, all in a single package with a single damage instruction and a single verdict form.

Research References

West's Key Number Digest
Fraud ⚷65(1)

Annotations

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Agency in issue 6
Burden of proof 2
Conjunctive submission 5
Damages 7
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Future event 10
Intent 3
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Ordinary care clause 4

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1. In general

Even if instruction based on MAI 23.05, standing alone, assumed disputed ultimate issue that agreement existed, no prejudicial error resulted since, under affirmative converse instruction requiring jury to return verdict for buyers if it believed parties did not make agreement, jury could not have returned verdict without first determining whether agreement existed. *Dierker Associates, D.C., P.C. v. Gillis*, 859 S.W.2d 737 (Mo.App. E.D. 1993).

Even if buyers' representation regarding payment under contract to purchase chiropractic practice was made as to future event, no error occurred, even though third paragraph did not contain the alternate language that "[plaintiffs] knew that it was false at the time the representation was made," because trial court gave affirmative converse instruction providing that verdict must be for buyers if jury believed representation was false at time it was made. *Dierker Associates, D.C., P.C. v. Gillis*, 859 S.W.2d 737 (Mo.App. E.D. 1993).

Car manufacturer's practice of test driving cars with odometer unhooked, repairing any damage occurring during such use, and selling such cars as new constituted fraud. *Maugh v. Chrysler Corp.*, 818 S.W.2d 658 (Mo.App. W.D. 1991).

Failure to include the bracketed portion of Paragraph 5 "in so relying plaintiff was using ordinary care and . . ." constitutes error unless the right to rely is not in issue. *Green Acres Enterprises, Inc. v. Nitsche*, 636 S.W.2d 149 (Mo.App. W.D. 1982).

Where a confidential relationship exists plaintiff had a right to rely on defendant's representation and need not submit the bracketed clause in paragraph Fifth requiring plaintiff to have used ordinary care in relying on defendant's representations. *Vinyard v. Herman*, 578 S.W.2d 938 (Mo.App. S.D. 1979).

Verdict director for fraud need not require finding of why statement was false. *Dettler v. Santa Cruz*, 403 S.W.2d 651 (Mo.App. 1966).

2. Burden of proof

Burden of proof in fraud case is no greater than other cases, and defendant was not entitled to an instruction requiring clear, cogent and convincing evidence. *Crawford v. Smith*, 470 S.W.2d 529 (Mo.banc 1971).

3. Intent

The phrase "defendant did not know whether the representation was true or false"—contained in instructions following the form of MAI 23.05—implied, without requiring a specific finding to that effect, that the defendant knew he did not know and, thus, did not misstate the element of scienter for the tort of fraudulent misrepresentation. *Botanicals on The Park, Inc. v. Microcode Corp.*, 7 S.W.3d 465 (Mo.App. E.D. 1999).

In instructing jury on elements necessary to prove insurance policy was void ab initio for fraudulent misrepresentation, trial court erred reversibly by adding to Missouri Approved Jury Instruction (MAI) language that intent to deceive would necessarily be implied if insured knew representation was false. *Cova v. American Family Mut. Ins. Co.*, 880 S.W.2d 928 (Mo.App. E.D. 1994).

Omission of element of fraud-feasor's *intent* that victim rely on the representation was error and prejudicial absent a clear showing of no prejudice. *Jefferson County Bank & Trust Co. v. Dennis*, 523 S.W.2d 165 (Mo.App. 1975).

4. Ordinary care clause

Although trial court failed to include, in fraudulent misrepresentation jury instruction, language from MAI 23.05 that seller was using "ordinary care" in relying on representations, no prejudice to buyers resulted; buyers did not object when instruction omitted language, instruction tendered by buyers omitted same language, and trial court instructed jury in next paragraph of its instruction that it must find that seller had right to rely on misrepresentations. *Dierker Associates, D.C., P.C. v. Gillis*, 859 S.W.2d 737 (Mo.App. E.D. 1993).

Where customer acted on auto dealer's representation of facts peculiarly within dealer's knowledge there was no need to submit the clause "in so relying plaintiff was using ordinary care, and". *Bowers v. S-H-S Motor Sales Corp.*, 481 S.W.2d 584 (Mo.App. 1972).

MAI 11.05 is not applicable to a fraud case and "ordinary care" may be defined as ". . . that degree of care that would be reasonable in view of plaintiff's situation." *Throckmorton v. M.F.A. Central Co-op.*, 462 S.W.2d 138 (Mo.App. 1970).

5. Conjunctive submission

Error to submit MAI 23.05 hypothesizing two fraudulent submissions conjunctively when there was evidence of only one of them. *Knepper v. Bollinger*, 421 S.W.2d 796 (Mo.App. 1967).

6. Agency in issue

MAI 23.05 to 18.01 submitting fraudulent representations by agent. *Tietjens v. General Motors Corp.*, 418 S.W.2d 75 (Mo. 1967).

Although defendant's answer denied salesman was its agent, where plaintiff's evidence of agency was not refuted by other evidence, agency was a question of law and need not be hypothesized in plaintiff's verdict director. *Bowers v. S-H-S Motor Sales Corp.*, 481 S.W.2d 584 (Mo.App. 1972).

7. Damages

Giving MAI 4.01 in fraud case held proper, particularly when neither party offered a modification nor contended later that the verdict was either inadequate or excessive. *Crawford v. Smith*, 470 S.W.2d 529 (Mo.banc 1971).

Failure to give mandatory damage instruction on fraudulent misrepresentation claim required setting aside of damage award and ordering of new trial on issue of actual damages on such claim, even though proper actual damages may have been requested in closing argument and awarded. *Dierker Associates, D.C., P.C. v. Gillis*, 859 S.W.2d 737 (Mo.App. E.D. 1993).

8. Exemplary damages

MAI 11.05 is not applicable to a fraud case and "ordinary care" may be defined as ". . . that degree of care that would be reasonable in view of plaintiff's situation." *Throckmorton v. MFA Central Co-op.*, 462 S.W.2d 138 (Mo.App. 1970).

9. Negligence

"Negligent" was not required to be defined in fraudulent misrepresentation verdict director which inadvertently referred to "negligent misrepresentation," since it was not necessary for jury to decide whether party was negligent. *Dierker Associates, D.C., P.C. v. Gillis*, 859 S.W.2d 737 (Mo.App. E.D. 1993).

Use of term "negligent misrepresentation" instead of "fraudulent misrepresentation" in instruction based on MAI 23.05, was not prejudicial to buyers of chiropractic practice; body of instruction required jurors to find elements of fraudulent misrepresentation, and fact that buyers' counsel made same mistake in their proposed verdict director indicated that mistake would not be readily apparent to jury. *Dierker Associates, D.C., P.C. v. Gillis*, 859 S.W.2d 737 (Mo.App. E.D. 1993).

10. Future event

Statement that Lot 335 "would not flood or that defendants would remedy any flooding problem experienced by Lot 335" was a representation of a future event, and therefore the second scienter alternate was the appropriate verdict director. *Stevens v. Markirk Construction, Inc.*, 454 S.W.3d 875 (Mo.banc 2015).

Log home kit manufacturer's statements of fact that homes' joints were designed to be weathertight, homes were to be long lasting and enduring, and that homes were chemicallytreated to minimize threat of rot were not representations of intention to perform or state of mind, but were present representations intended to induce buyers to purchase log homes, and thus did not warrant fraud verdict directing instruction pertaining to representations of future event. *Judy v. Arkansas Log Homes, Inc.*, 923 S.W.2d 409 (Mo.App. W.D. 1996).

23.06 [1980 Withdrawn] Libel

23.06(1) [1980 New] Libel—Plaintiff Not a Public Official or Public Figure

Your verdict must be for plaintiff if you believe:

First, defendant *(describe act such as "published a newspaper article")* containing the statement *(here insert the statement claimed to be libelous such as "plaintiff was a convicted felon")*, and[1]

Second, defendant was at fault in publishing such statement, and

Third, such statement tended to [expose plaintiff to (select appropriate term or terms such as "hatred", "contempt" or "ridicule")] [or] [deprive the plaintiff of the benefit of public confidence and social associations],[2] and

Fourth, such statement was read by *(here insert name of person or persons other than plaintiff or the appropriate generic term such as "the public")*, and

Fifth, plaintiff's reputation was thereby damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 New)

1. If the alleged libelous statement is a lengthy writing such as a newspaper or magazine article or a book, paragraph First may be modified to identify the writing by reference, for example:

First, defendant published the newspaper article identified as plaintiff's exhibit one, and

Also modify the other paragraphs of the instruction by changing the phrase "such statement" to "such article" or other appropriate generic term.

2. Select the appropriate phrase or phrases.

This instruction is intended for use in a case involving a private plaintiff, i.e., someone who is neither a public official nor a public figure. See Committee Comment to MAI 23.06(2) as to whether this instruction is applicable where the statement concerns a private plaintiff involved in a matter of public or general interest. Use MAI 23.06(2) if plaintiff is a public official or public figure.

It is a question of law for the court to decide whether qualified privilege applies. *Estes v. Lawton-Byrne-Bruner Insurance Agency Co.*, 437 S.W.2d 685 (Mo.App. 1969). Use MAI 23.06(2) if the court determines that qualified privilege is applicable.

Use MAI 4.15 as the damage instruction with this verdict director. If punitive damages are submitted, use MAI 3.06 as the burden of proof instruction; if punitive damages are not submitted, use MAI 3.01.

* Add if affirmative defense is submitted.

Committee Comment (1980 New)

A. The federal decisions balancing the federal first amendment protections of free speech and freedom of the press against the states' interest in protecting citizens from defamation have produced standards of law which are imposed upon the states by the Federal Constitution. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the Court held that so long as the states do not impose liability without fault, they may define for themselves the appropriate standard of liability for defamation to a private individual. Thus, the constitutional standard requires that liability must be based upon the fault of the defendant. This federal standard is submitted to the jury in paragraph Second; pursuant to Mo. Const. Art. I, § 8 (1945) it is left to the jury to determine exactly what standard of fault shall be applied.

B. *Gertz* also prohibits liability without a finding of actual damages. Paragraph Fifth, which requires that the plaintiff's reputation be damaged, meets both this requirement and the requirement of the Missouri common law that the essence of defamation is injury to reputation.

C. *See*, Committee Comment to MAI 23.06(2) regarding protected expressions of ideas versus actionable statements of "opinion" and assertions of "fact".

Research References

West's Key Number Digest
Libel and Slander ⚷124(1)

Annotations

In general 1
Actual malice 3
Damages 4
Defensive instructions 2

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1. In general

In libel action against credit reporting service alleging that agency issued a false report that plaintiffs had filed for bankruptcy, proper instruction was MAI 23.06(2), not MAI 23.06(1), because agency was entitled to qualified privilege. *McDowell v. Credit Bureaus of Southeast Mo., Inc.*, 747 S.W.2d 630 (Mo.banc 1988).

Whether privilege exists to report on filing of court petition in circumstances proven is question of law and is not to be submitted to jury; newspaper story stating that defamation plaintiff was defendant in lawsuit was totally inaccurate report of petition filed with court and, thus, defense of privilege was not available to newspaper; in reporting on content of petition, newspaper was obligated to print substantially correct report. *Hoeflicker v. Higginsville Advance, Inc.*, 818 S.W.2d 650 (Mo.App. W.D. 1991).

MAI 23.06, Libel, is not to be used in action by public official where malice must be submitted and defined. *Rowden v. Amick*, 446 S.W.2d 849 (Mo.App. 1969).

In libel action the existence of a qualified privilege is for the court rather than the jury, and when found to exist plaintiff must include paragraph Fourth to his verdict director. *Estes v. Lawton-Byrne-Bruner Ins. Agency Co.*, 437 S.W.2d 685 (Mo.App. 1969).

2. Defensive instructions

Error for a defendant to define a phrase not used in plaintiff's verdict director. *Lazier v. Pulitzer Pub. Co.*, 467 S.W.2d 900, certiorari denied 404 U.S. 940, 92 S.Ct. 273, 30 L.Ed.2d 253 (1971).

3. Actual malice

In action by public official he must show "actual malice" and that is not covered by paragraph Fourth of MAI 23.06, which should be amended to submit knowledge or serious doubts as to truth. *Ramacciotti v. Zinn*, 550 S.W.2d 217 (Mo.App. 1977).

4. Damages

Jury instruction, in defamation action brought by grandmother against discount store, that jury was required to find that missing child poster that included grandmother's name "directly caused or directly contributed to cause damage to" the grandmother, was improper; defamation required finding of damage to grandmother's reputation, but jury instruction misdirected the jury and allowed recovery of damages without finding injury to reputation. *Kenney v. Wal-Mart Stores, Inc.*, 100 S.W.3d 809 (Mo.banc 2003).

In defamation cases, old rules of per se and per quod do not apply and plaintiff need only plead and prove the unified defamation elements set out in MAI 23.06(1) and 23.06(2), and thus plaintiffs need not concern themselves with whether defamation was per se or per quod nor with whether special damages exist, but must prove actual damages in all cases. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo.banc 1993).

23.06(2) [1980 New] Libel—Plaintiff a Public Official or Public Figure

Your verdict must be for plaintiff if you believe:

First, defendant *(describe act such as "published a newspaper article")* containing the statement *(here insert the statement claimed to be libelous such as "plaintiff was a convicted felon")*, and[1]

Second, such statement was false, and

Third, defendant *(describe the act of publication such as "published such statement", "wrote such letter", etc.)* either:
with knowledge that it was false, or
with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true, and

Fourth, such statement tended to [expose plaintiff to (select appropriate term or terms such as "hatred", "contempt" or "ridicule")] [or] [deprive the plaintiff of the benefit of public confidence and social associations],[2] and

Fifth, such statement was read by *(here insert name of person or persons other than plaintiff or the appropriate generic term such as "the public")*, and

Sixth, plaintiff's reputation was thereby damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 New)

1. If the alleged libelous statement is a lengthy writing such as a newspaper or magazine article or a book, paragraph First may be modified to identify the writing by reference, for example:

First, defendant published the newspaper article identified as plaintiff's exhibit one, and

Also modify the other paragraphs of the instruction by changing the phrase "such statement" to "such article" or other appropriate generic term.

2. Select the appropriate phrase or phrases.

This instruction is intended for use where the plaintiff is a public official or public figure. Use MAI 23.06(1) for a private plaintiff but see the last paragraph of Committee's Comment below as to whether the above instruction (MAI 23.06(2)) is applicable where the statement concerns a private plaintiff involved in a matter of public or general interest.

Use MAI 3.05 for burden of proof and MAI 4.16 as the damage instruction with this verdict director.

* Add if affirmative defense is submitted.

Committee Comment (1990 Revision)

A. *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), requires actual malice before a recovery may be made in defamation by a public official. The same protection was extended to public figures in *Curtis Publishing Company v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967). The extent to which this protection is available is further defined and to some extent altered by *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), and *Time, Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976). Paragraphs Second and Third in MAI 23.06(2) reflect the actual malice requirement of *New York Times* as the test was further articulated in *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968). The Missouri courts have applied the *New York Times* test on a number of occasions. See *Glover v. Herald Co.*, 549 S.W.2d 858 (Mo.banc 1977); *Skain v. Weldon*, 422 S.W.2d 271 (Mo. 1967); *Rowden v. Amick*, 446 S.W.2d 849 (Mo.App. 1969); and *Whitmore v. Kansas City Star Co.*, 499 S.W.2d 45 (Mo.App. 1973).

B. It is not clear under the present Missouri cases whether the *New York Times* standard of actual malice applies in a Missouri case involving a private plaintiff where the defamatory falsehood concerns matters of public or general interest. In *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), a plurality of the Supreme Court extended the *New York Times* standard to such a situation; this standard was applied by the Missouri court in a similar situation in *Woolbright v. Sun Communications, Inc.*, 480 S.W.2d 864 (Mo. 1972). Thereafter, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974), the U.S. Supreme Court backed away from the plurality position in *Rosenbloom* and did not require the *New York Times* standard to be applied to a private defamation plaintiff involved in a matter of public or general interest. The Missouri courts could continue to apply this standard in such cases. However, they are probably no longer constitutionally required to do so, and it would appear to be an open question as to what position the Missouri courts will take now that they are free to determine their own position on this issue.

C. Dicta in *Gertz*, a media defendant case, stated that while there is no constitutional value in false statements of fact there is no such thing as a false idea. *Henry v. Halliburton*, 690 S.W.2d 775 (Mo.banc 1985) adopted that dicta as the law of Missouri and construed the First Amendment protection of ideas to apply to both media and private defendants. The question of fact or idea is a question of law which determines submissibility. It must be decided by the court from the "totality of the circumstances," . . ., "It is up to the trial judge in the first instance to determine whether the alleged statements are capable of being treated as assertions of fact, although the jury may decide that they were not so understood." *Id.* at 788.

D. *Gertz*, was refined in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 110 S.Ct. 2695, 111 L.Ed.2d 1 (1990). *Milkovich* held that the above referenced dicta in *Gertz* did not create a wholesale defamation exemption under the First Amendment for anything that might be labeled an "opinion". The test under *Milkovich* for actionability is whether the statement of "opinion" is sufficiently factual to be susceptible of being proved true or false. *Henry v. Halliburton, supra*, should be read in light of *Milkovich*.

E. In *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 106 S.Ct. 1558, 89 L.Ed.2d 783 (1986), a narrow opinion limited to a private plaintiff suing a media defendant for libel in a matter of public concern, the court shifted the burden of proof on truth-falsity to the plaintiff. Concurring justices would have extended the shift in similar cases against any defendant. Paragraph Second of MAI 23.06(2) already imposes the burden on a public official plaintiff. Prudence would suggest that such a paragraph Second should be included in MAI 23.06(1) when a private plaintiff is suing a media defendant on a publication of public concern. Review of federal decisions later than 1986 should be made when using MAI 23.06(1) against non-media defendants to be sure that the view of the concurring justices in *Philadelphia Newspapers* has not become the majority view.

Research References

West's Key Number Digest
Libel and Slander ⚷124(1)

Annotations

In general 1
Damages 3
Evidentiary support 2

1. In general

In libel action against credit reporting service alleging that agency issued a false report that plaintiffs had filed for bankruptcy, proper instruction was MAI 23.06(2), not MAI 23.06(1), because agency was entitled to qualified privilege. *McDowell v. Credit Bureaus of Southeast Mo., Inc.*, 747 S.W.2d 630 (Mo.banc 1988).

Whether privilege exists to report on filing of court petition in circumstances proven is question of law and is not to be submitted to jury; newspaper story stating that defamation plaintiff was defendant in lawsuit was totally inaccurate report of petition filed with court and, thus, defense of privilege was not available to newspaper; in reporting on content of petition, newspaper was obligated to print substantially correct report. *Hoeflicker v. Higginsville Advance, Inc.*, 818 S.W.2d 650 (Mo.App. W.D. 1991).

2. Evidentiary support

Evidence was insufficient to support jury finding that corporate agent defamed former employee by sending a letter concerning employee's misconduct to party with interest in employee's conduct, where there was no evidence that when agent mailed the letter, he had any reason to doubt or question the information in the letter and, thus, employee failed to prove publication with malice, which is an essential element of employee's claim. *Washington v. Thomas*, 778 S.W.2d 792 (Mo.App. E.D. 1989).

3. Damages

In defamation cases, old rules of per se and per quod do not apply and plaintiff need only plead and prove the unified defamation elements set out in MAI 23.06(1) and 23.06(2), and thus plaintiffs need not concern themselves with whether defamation was per se or per quod nor with whether special damages exist, but must prove actual damages in all cases. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo.banc 1993).

23.07 [2000 Revision] Malicious Prosecution—For Initiating or Continuing Criminal or Civil Actions

Your verdict must be for plaintiff if you believe:

First, defendant ["instigated", "continued"][1] a judicial proceeding against plaintiff that terminated in favor of plaintiff, and

Second, in so doing defendant acted maliciously[2] and without reasonable grounds,[3] and

Third, plaintiff was thereby damaged.

*[unless you believe that plaintiff is not entitled to recover by reason of Instruction Number ____ *(here insert number of affirmative defense instruction)*].

Notes on Use (2000 Revision)

1. Select the appropriate term. See *King v. Ryals*, 981 S.W.2d 151 (Mo.App. E.D. 1998).

2. The term "maliciously" must be defined. See definitions at MAI 16.01(1) and 16.02(2). *Sanders v. Daniel Intern. Corp.*, 682 S.W.2d 803 (Mo.banc 1984); and *Proctor v. Stevens Employment Services, Inc.*, 712 S.W.2d 684 (Mo.banc 1986).

3. The phrase "reasonable grounds" must be defined. See definitions at MAI 16.05 and 16.06.

* Add if affirmative defense is submitted.

Committee Comment (1996 Revision)

A. See Committee Comment to MAI 23.04.

B. In cases involving merchants, see § 537.125, RSMo.

C. Where agency is in issue, see MAI 18.01.

D. "[T]he constitutive elements of an action for malicious prosecution are: (1) The commencement or prosecution of the proceeding against him or her; (2) its legal causation by the present defendant; (3) its termination in favor of the present plaintiff; (4) the absence of probable cause for such proceeding; (5) the presence of malice therein; and (6) damage to plaintiff by reason thereof." *Bonzo v. Kroger Grocery & Baking Co.*, 344 Mo. 127, 125 S.W.2d 75 (1939); citing *Higgins v. Knickmeyer-Fleer Realty & Investment Co.*, 335 Mo. 1010, 74 S.W.2d 805, 812 (Mo. 1934).

E. In *Sanders v. Daniel International Corp.*, 682 S.W.2d 803 (Mo.banc 1984), the Missouri Supreme Court held that the requirement for "malice" to support actual damages in a malicious prosecution case arising out of a criminal prosecution is satisfied by a finding of "legal malice". The *Sanders* case, *supra*, also held that punitive damages in such a malicious prosecution case may only be submitted to a jury if there is evidence of "actual malice" or "malice in fact" as opposed to "legal malice".

F. In *Sanders,* 682 S.W.2d at 814, the Supreme Court held:

> The Restatement of Torts (Second) § 668 (1965) provides: "To subject a person to liability for malicious prosecution, the proceeding must have been initiated primarily for a purpose other than that of bringing an offender to justice." This definition, while not requiring proof of malice in fact, will require proof of legal malice and bring Missouri back into step with the majority of jurisdictions.

G. In *Proctor v. Stevens Employment Services, Inc.*, 712 S.W.2d 684 (Mo.banc 1986), the Missouri Supreme Court decided that the holding in *Sanders, supra*, does not apply to malicious prosecution actions arising out of a civil case. *Proctor* also held that "malice in law", MAI 16. 01(1), is the appropriate definition of "malice" for submission of actual damages under MAI 23.07 in a malicious prosecution case arising out of a civil action.

H. In *Burnett v. Griffith*, 769 S.W.2d 780, 789 (Mo.banc 1989); the Supreme Court adopted a new MAI 10.01 for submission of punitive damages in intentional tort cases and held that the definition of "malice" in prior MAI 16.01 should no longer be used in connection with the submission of punitive damages. "Malicious prosecution" is an intentional tort. See MAI 10.01 for submission of punitive damages.

Research References

West's Key Number Digest
Malicious Prosecution ⚷72(1)

Legal Encyclopedias
C.J.S., Malicious Prosecution or Wrongful Litigation § 138

Annotations

In general 1
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1. In general

In malicious prosecution actions, arising out of criminal proceeding, "the second paragraph of MAI 23.07 should be amended as follows: 'Second, in so doing defendant acted primarily for a purpose other than that of bringing an offender to justice and acted without reasonable grounds, and . . .' " *Sanders v. Daniel Intern. Corp.*, 682 S.W.2d 803 (Mo.banc 1984).

Giving two identical verdict directors which were affirmative converses to mortgagors' malicious prosecution verdict directors was not error in action against mortgagee, where each mortgagor claimed separate damages based on single theory of recovery, and damage claims were virtually independent. *Burnett v. GMAC Mortgage Corp.*, 847 S.W.2d 82 (Mo.App. W.D. 1992).

In action for wrongful sequestration, court correctly refused to give MAI 23.07, Malicious Prosecution. *Fischer v. MAJ Inv. Corp.*, 631 S.W.2d 902 (Mo.App. E.D. 1982).

2. Termination

Where defendant had obtained default judgment against plaintiff, allegedly by false return of process, she could not recover for malicious prosecution because the action had not terminated in plaintiff's favor. Proper action was for false return of process. *Jackson v. Missouri Rating & Collection Co.*, 537 S.W.2d 442 (Mo.App. 1976).

Evidence that defendant dismissed its suit against plaintiff without prejudice warranted a submission that the suit "terminated in favor of plaintiff." *McFarland v. Union Finance Co.*, 471 S.W.2d 497 (Mo.App. 1971).

3. Definition

MAI 16.01, a definition of malice in law, is the proper definition of malice in a civil malicious prosecution action. *Proctor v. Stevens Employment Services, Inc.*, 712 S.W.2d 684 (Mo.banc 1986).

MAI 16.01 improperly defines the element of malice in a malicious prosecution action arising from criminal proceedings and does not adequately express the degree of culpability required for punitive damages. *Sanders v. Daniel Intern. Corp.*, 682 S.W.2d 803 (Mo.banc 1984).

Failure to define the term "malice" was not reversible error in malicious prosecution action where there was no objection and the term "maliciously" was defined. *Burnett v. GMAC Mortgage Corp.*, 847 S.W.2d 82 (Mo.App. W.D. 1992).

Definition of "reasonable grounds" properly refused as argumentative. *Boquist v. Montgomery Ward & Co.*, 516 S.W.2d 769 (Mo.App. 1974).

4. Burden of proof

MAI 3.01 is proper burden of proof instruction in civil malicious prosecution case. *Proctor v. Stevens Employment Services, Inc.*, 712 S.W.2d 684 (Mo.banc 1986).

5. Punitive damages

MAI 16.01, a definition of malice in law, does not adequately express degree of culpability required for an award of punitive damages in a malicious prosecution case arising from a civil proceeding. Instead, the jury must be instructed that in order to award punitive damages, "the proceedings must have been initiated or continued primarily for a purpose other than that of securing the proper adjudication of the claim on which they are based." *Proctor v. Stevens Employment Services, Inc.*, 712 S.W.2d 684 (Mo.banc 1986).

6. Reasonable grounds

Plaintiff alleging malicious prosecution must prove defendant's want of probable cause to have initiated or to have continued to prosecute original action against malicious prosecution plaintiff. *King v. Ryals*, 981 S.W.2d 151 (Mo.App. E.D. 1998).

7. Continuation of malicious proceeding

Trial court should have submitted proposed instruction that malicious prosecution could be based upon either initiation or continuation of malicious proceedings, rather than submit MAI 23.07, which did not require finding of malicious prosecution based upon malicious continuation of proceedings; proposed instruction properly reflected law and facts of case that action in malicious prosecution may be based on malicious continuation of prosecution. *King v. Ryals*, 981 S.W.2d 151 (Mo.App. E.D. 1998).

23.08 [1990 Revision] Service Letters

Your verdict must be for plaintiff if you believe:

First, plaintiff was employed by defendant[1] for at least 90 days, and

Second, after such employment ended, plaintiff made a written request[2] within a reasonable period of time[3] to *(insert appropriate title or name of person to whom the request must be made under the statute)* for a service letter, and

[Third, defendant did not issue such a letter to plaintiff.][4]

[Third, defendant did not issue such a letter to plaintiff within 45 days after receipt of such request.][4]

[Third, defendant's letter did not correctly state [the length of employment] [the true cause for which plaintiff was terminated or quit such employment] [the nature and character of plaintiff's services during such employment.][5]][4]

[Third, defendant's letter did not include a statement setting forth [the length of employment] [the true cause for which plaintiff was terminated or quit such employment] [the nature and character of plaintiff's services during such employment.][5]][4]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1990 Revision)

1. On rare occasions there may be a factual dispute as to whether defendant was a corporation or had more than seven employees as required by § 290.140, R.S.Mo., If such a factual dispute is appropriate for resolution by the jury, add a paragraph to this verdict directing instruction submitting those issues and renumber the remaining paragraphs.

2. § 290.140.1, R.S.Mo., requires that the plaintiff's written request be by certified mail with specific reference to the statute. If these requisites are in dispute, insert the applicable portion(s) of the following phrase: "by certified mail with specific reference to the service letter statute".

3. § 290.140.1, R.S.Mo., provides that the employee's request must be within a reasonable period of time, but not later than one year. If there is a legitimate factual dispute as to whether the request was made within one year after termination, insert the following phrase: "but not later than one year after such employment ended".

4. Select the appropriate paragraph or paragraphs Third. If more than one is used, they must be submitted in the disjunctive and each must be supported by substantial evidence.

5. Select the appropriate phrase or phrases. If more than one is used, they must be submitted in the disjunctive and each must be supported by the evidence.

* Add if affirmative defense is submitted.

Committee Comment (1990 Revision)

A. § 290.140.2 R.S.Mo., authorizes nominal damages in some circumstances even in the absence of actual damages. In such a situation, if plaintiff desires an instruction on nominal damages, the following sentence should be added to the actual damage instruction.

> "If you find in favor of plaintiff but do not believe plaintiff sustained compensatory damages, you must award plaintiff nominal damages in the amount of one dollar."

B. If actual damages are not submissible, nominal damages may still be awarded and serve as the basis for punitive damages where the defendant did not send the requested letter. § 290.140(2), R.S.Mo. In such a case the damage instruction will be:

> "If you find in favor of plaintiff, then you must award plaintiff nominal damages in the amount of one dollar."

C. In *Hills v. McComas Rentals, Inc.*, 779 S.W.2d 297, 300 (Mo.App. W.D. 1989); the Court held that the failure of the service letter to meet all three requirements for the contents of a service letter is equivalent to nonissuance. *Hills* also holds that, if punitive damages are submissible in a service letter case, those punitive damages must be submitted under the standard set forth in MAI 10.01 and *Burnett v. Griffith*, 769 S.W.2d 780 (Mo.banc 1989).

D. If the corporation does not have a titled officer the statute includes such title or person as may have general supervision or corporate authority to write service letters. *Chrisman v. Terminal R. Ass'n of St. Louis*, 237 Mo.App. 181, 157 S.W.2d 230 (1942); *Turner v. Emerson Electric Mfg. Co.*, 280 S.W.2d 474 (Mo.App. 1955).

E. It is the corporate duty to issue such letter. *Cheek v. Prudential Ins. Co. of America*, 192 S.W. 387 (Mo. 1916).

F. No finding of damage is required since failure to issue a proper letter entitles plaintiff to nominal damages without proof. *Heuer v. John R. Thompson Co., supra; Cook v. Mid-Continent Petroleum Corp.*, 193 S.W.2d 66 (Mo.App. 1946).

G. The statute is to be strictly construed and plaintiff must be within its terms. *Lyons v. St. Joseph Belt Ry. Co.*, 232 Mo.App. 575, 84 S.W.2d 933 (1935), cert. quashed 341 Mo. 733, 108 S.W.2d 351 (1937).

H. If the request was actually for a report to the Unemployment Compensation Commission then no service letter action exists. *Seiller v. Kiel*, 149 S.W.2d 463 (Mo.App. 1941).

Research References

West's Key Number Digest
Labor and Employment ⚷1993

Annotations

1. In general

Under MAI 23.08 plaintiff need not show the true reason for discharge; that is defendant's burden. *Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197 (Mo. 1972).

§ 290.140, R.S.Mo. 1986 provides basis for claim against university for failure to provide service letter to temporary librarian upon failure to renew her employment. *Krasney v. Curators of University of Mo.*, 765 S.W.2d 646, 650–51 (Mo.App. W.D. 1989).

MAI 23.08 properly requires that a service letter "correctly state the . . . true cause" of plaintiff's discharge; it does not change the substantive law of § 290.140, RSMo., requiring a service letter "truly stating for what cause" defendant discharged plaintiff; there's no substantial difference. *Cumby v. Farmland Industries*, 524 S.W.2d 132 (Mo.App. 1975).

23.09 [1980 Withdrawn] Slander—Not Per Se

23.10 [1980 Withdrawn] Slander Per Se

23.10(1) [1980 New] Slander—Plaintiff Not a Public Official or Public Figure

Your verdict must be for plaintiff if you believe:

First, defendant stated *(here insert the statement claimed to be slanderous such as "plaintiff was a convicted felon")*, and

Second, defendant was at fault in making such statement, and

Third, such statement tended to [expose plaintiff to (select appropriate term or terms such as "hatred", "contempt" or "ridicule")] [or] [deprive the plaintiff of the benefit of public confidence and social associations],[1] and

Fourth, such statement was heard by *(here insert name of person or persons other than plaintiff who heard the statement)*, and

Fifth, plaintiff's reputation was thereby damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 New)

1. Select the appropriate phrase or phrases.

This instruction is intended for use in a case involving a private plaintiff, i.e., someone who is neither a public official nor a public figure. See Committee Comment to MAI 23.06(2) as to whether this instruction is applicable where the statement concerns a private plaintiff involved in a matter of public or general interest. Use MAI 23.10(2) in a slander case where plaintiff is a public official or public figure.

It is a question of law for the court to decide whether qualified privilege applies. *Estes v. Lawton-Byrne-Bruner Insurance Agency Co.*, 437 S.W.2d 685 (Mo.App. 1969). Use MAI 23.10(2) if the court determines that qualified privilege is applicable.

Use MAI 4.15 as the damage instruction with this verdict director.

If punitive damages are submitted, use MAI 3.06 as the burden of proof instruction; if punitive damages are not submitted, use MAI 3.01.

* Add if affirmative defense is submitted.

Committee Comment (1995 Revision)

A. See Committee Comment to MAI 23.06(1) for a discussion of the federal constitutional standards imposed upon the states in a defamation case involving a plaintiff who is neither a public official nor a public figure. See the Committee Comment to MAI 23.10(2) as to the applicability to slander cases of federal constitutional standards developed in libel cases.

B. In *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo.banc 1993), the Court held "in defamation cases the old rules of *per se* and *per quod* do not apply and plaintiff need only to plead and prove the unified defamation elements set out in MAI 23.10(1) and 23.10(2). In short, plaintiffs need not concern themselves with whether the defamation was *per se* or *per quod*, nor with whether special damages exist, but must prove actual damages in all cases."

C. *Nazeri* also discusses the types of statements that may qualify as "slanderous" for purposes of paragraph First of MAI 23.10(1) and 23. 10(2).

Research References

West's Key Number Digest
Libel and Slander ⚷124(1)

Annotations

1. In general

Error to submit 23.10(1) where qualified privilege applies, but error not prejudicial where jury in awarding punitive damages found malice sufficient to overcome qualified immunity. *Carter v. Willert Home Products, Inc.*, 714 S.W.2d 506 (Mo.banc 1986).

Plaintiff need only to plead and prove unified defamation elements set out in applicable model jury instructions to establish defamation. *Boyd v. Schwan's Sales Ent. Inc.*, 23 S.W.3d 261 (Mo.App. S.D. 2000).

Recovery on a slander claim requires a showing of actual damages. *Jenkins v. Revo. Helicopter Corp., Inc.*, 925 S.W.2d 939 (Mo.App. W.D. 1996).

In defamation cases the old rules of per se and per quod do not apply; plaintiff need only plead and prove the unified defamation elements set out in MAI 23.10(1) and 23.10(2). *Thurston v. Ballinger*, 884 S.W.2d 22 (Mo.App. W.D. 1994).

Statement by director of police academy to police chief, that applicant cheated on entrance examination, was qualifiedly privileged for purposes of applicant's slander action; trial court therefore erred in failing to instruct on malice; but evidence was insufficient to establish director acted with actual malice as required to overcome director's qualified privilege. *Dvorak v. O'Flynn*, 808 S.W.2d 912 (Mo.App. E.D. 1991).

MAI 23.10(1) is not inadequate due to its failure to require finding by jury that allegedly defamatory statement was false or its failure to require submission to jury of definition of the term "fault." *Joseph v. Elam*, 709 S.W.2d 517 (Mo.App. E.D. 1986).

23.10(2) [1980 New] Slander—Plaintiff a Public Official or Public Figure

Your verdict must be for plaintiff if you believe:

First, defendant stated *(here insert the statement claimed to be slanderous such as "plaintiff was a convicted felon")*, and

Second, such statement was false, and

Third, defendant *(describe the act of publication such as "published such statement", "wrote the letter", etc.)* either: with knowledge that it was false, or with reckless disregard for whether it was true or false at a time when defendant had serious doubt as to whether it was true, and

Fourth, such statement tended to [expose plaintiff to (select appropriate term or terms such as "hatred", "contempt" or "ridicule")] [or] [deprive the plaintiff of the benefit of public confidence and social associations],[1] and

Fifth, such statement was heard by *(here insert name of person or persons other than plaintiff who heard the statement)*, and

Sixth, plaintiff's reputation was thereby damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 New)

1. Select the appropriate phrase or phrases.

This instruction is intended for use where the plaintiff is a public official or public figure. Use MAI 23.10(1) for a private plaintiff but see the last paragraph of Committee Comment to MAI 23.06(2) as to whether the above instruction (MAI 23.10(2)) is applicable where the statement concerns a private plaintiff involved in a matter of public or general interest.

Use MAI 3.05 for burden of proof and MAI 4.16 as the damage instruction with this verdict director.

* Add if affirmative defense is submitted.

Committee Comment (1995 Revision)

A. The United States Supreme Court cases extending federal constitutional protection to defamation defendants have not distinguished between libel and slander. *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 91 S.Ct. 1811, 29 L.Ed.2d 296 (1971), involved a television-broadcaster defendant who was afforded the protection of the *New York Times* standard. Neither the Supreme Court nor the Missouri courts have addressed the questions of whether statements broadcast by television are libel or slander or a hybrid. In any event, it cannot be seriously doubted that the federal constitutional protections for defamation defendants extend to slander cases on the same basis as to libel cases. See the Committee Comment to MAI 23.06(2) for a discussion of the federal standard incorporated in MAI 23.06(2) and the above instruction, both of which are substantially similar.

B. In *Nazeri v. Missouri Valley College*, 860 S.W.2d 303 (Mo.banc 1993), the Court held "in defamation cases the old rules of *per se* and *per quod* do not apply and plaintiff need only to plead and prove the unified defamation elements set out in MAI 23.10(1) and 23.10(2). In short, plaintiffs need not concern themselves with whether the defamation was *per se* or *per quod*, nor with whether special damages exist, but must prove actual damages in all cases."

C. *Nazeri* also discusses the types of statements that may qualify as "slanderous" for purposes of paragraph First of MAI 23.10(1) and 23. 10(2).

Research References

West's Key Number Digest
Libel and Slander ⚷124(1)

Annotations

1. In general

Statements made by employer's employment verifier to finance company that employee had credit complaints as well as judgments and garnishments against her were, as a matter of law, qualifiedly privileged, thus requiring showing of malice. MAI 23.10(2) was thus appropriate instruction, and trial court erred in submitting MAI 23.10(1). *Carter v. Willert Home Prods., Inc.*, 714 S.W.2d 506, 513 (Mo.banc 1986).

Verdict directing instruction should have been submitted in action by employee against former employer for allegedly defamatory communication to other employees and customer that employee was terminated for stealing company money; employer's communications to other employees and customer were protected by qualified privilege, but employee made submissible case of actual malice to defeat that privilege. *Deckard v. O'Reilly Automotive, Inc.*, 31 S.W.3d 6 (Mo.App. W.D. 2000).

Plaintiff need only to plead and prove unified defamation elements set out in applicable model jury instructions to establish defamation. *Boyd v. Schwan's Sales*

Enterprises, Inc., 23 S.W.3d 261 (Mo.App. S.D. 2000).

In defamation cases the old rules of per se and per quod do not apply; plaintiff need only plead and prove the unified defamation elements set out in MAI 23.10(1) and 23.10(2). *Thurston v. Ballinger*, 884 S.W.2d 22 (Mo.App. W.D. 1994).

Evidence was insufficient to establish that officer at police academy in charge of independent applicants acted with malice when he told his superiors that applicant had cheated on his entrance examination, as required to overcome officer's qualified privilege in applicant's slander action; although applicant presented evidence concerning his "connections" within police academy, inference that officer deliberately accused applicant of cheating because of such connections was speculative. *Dvorak v. O'Flynn*, 808 S.W.2d 912 (Mo.App. E.D. 1991).

23.11 [1981 Revision] Tortious Interference With Contract

Your verdict must be for plaintiff if you believe:

First, a contract existed between plaintiff and *(insert name of third party)* which was [breached] [terminated][1] by *(insert name of third party)*, and[2]

Second, defendant caused *(insert name of third party)* to [breach] [terminate][1] the contract with plaintiff, and

Third, defendant did so intentionally and without justification or excuse, and

Fourth, plaintiff was thereby damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1991 Revision)

1. Select the appropriate term.

2. If defendant's knowledge of the contract is in dispute, insert the following paragraph and renumber the remaining paragraphs.

"Second, defendant knew of such contract, and"

The term "third party" means the one with whom plaintiff had a contract and the one who, at defendant's request, breached or terminated the contract.

* Add if affirmative defense is submitted.

Committee Comment (1991 Revision)

A. *Downey v. United Weatherproofing*, 363 Mo. 852, 253 S.W.2d 976, 980–81 (1953), stated:

> It has now come to be the view of a majority of courts in this country that one who maliciously or without justifiable cause induces a person to breach his contract with another may be held responsible to the latter for the damages resulting from

> such breach. The term 'maliciously' in this connection alludes to malice in its technical legal sense, that is, the intentional doing of a harmful act without justification or excuse, and does not necessarily include actual malice, that is malice in the sense of spite or ill will . . ..
>
> . . . action will lie for the malicious procurement of the breach of any contract.

B. See *Community Title Co. v. Roosevelt Federal Savings & Loan Ass'n*, 670 S.W.2d 895 (Mo.App. E.D. 1984) for discussion of the elements of tortious interference with contract.

Research References

West's Key Number Digest
Torts ⚷10

Legal Encyclopedias
C.J.S., Torts § 107

Annotations

1. In general

Even if real estate salesman who owned one-third share in real estate company was fired by company's shareholders and president so as to remove him from company and force him to sell his common stock at low price under buy-sell agreement, salesman failed to plead sufficient facts establishing absence of justification element of claim for tortious interference with contract, where salesman did not base his claim on breach of buy-sell agreement but rather on his termination, salesman was fired for his unauthorized real estate activities in another state, salesman was not licensed to sell real estate in other state, and salesman was employee-at-will. *Murray v. Ray*, 862 S.W.2d 931 (Mo.App. S.D. 1993).

Developer alleging that competitor tortiously interfered with its contract with redevelopment agency was not entitled to jury instruction that competitor could be liable if its actions "contributed to cause" redevelopment agency to terminate contract. *White v. Land Clearance for Redevelopment Authority*, 841 S.W.2d 691 (Mo.App. W.D. 1992).

Breach of employment contract. *State ex rel. State Dept. of Public Health and Welfare, Div. of Welfare v. Luster*, 456 S.W.2d 600 (Mo.App. 1970).

23.12(1) [1989 New] Conversion—Taking

Your verdict must be for plaintiff if you believe:

First, plaintiff was *(here describe facts which entitled plaintiff to possession—e.g.—"the owner of the watch", "the lessee of the automobile")*, and

Second, defendant took possession of *(here describe the property)* with the intent to exercise some control over *(here describe the property)*,[1] and

Third, defendant thereby deprived plaintiff of the right to possession of *(here describe the property)*.

* [unless you believe that plaintiff is not entitled to recover by reason of Instruction No. ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1989 New)

1. In a case which does not involve a wrongful taking, but involves a wrongful appropriation (such as where the owner delivers property to the defendant with instructions that it be used for a certain purpose, but the defendant uses the property contrary to the instructions) modify paragraph Second to submit the facts which are claimed to constitute the wrongful appropriation.

See MAI 32.26 and 32.27 for instructions relating to affirmative defenses of consent and abandonment, respectively. See MAI 23.12(2) relating to conversion by the act of failure to surrender possession.

* Add if affirmative defense is submitted.

Committee Comment (1989 New)

A. Conversion is the unauthorized assumption of the right of ownership over the personal property of another to the exclusion of the owner's rights. *Maples v. United Savings & Loan Ass'n*, 686 S.W.2d 525 (Mo.App. S.D. 1985). Conversion is generally concerned with possession, not ownership. The plaintiff must be either the owner or be the person having a right to immediate possession at the time of the conversion; *Hampton v. Stephens*, 691 S.W.2d 287 (Mo.App. W.D. 1985). To be liable for conversion the defendant must have intended to convert the property to use inconsistent with the owner's right; *Owens v. Automobile Recovery Bureau, Inc.*, 544 S.W.2d 26 (Mo.App. 1976).

B. The unauthorized assumption of the right of ownership may take one of three forms: (1) tortious taking; (2) use or appropriation to use; or, (3) refusal to surrender possession after demand. Tortious taking involves the defendant's wrongful acquisition of the property. Use or appropriation to use may involve rightful acquisition but unauthorized use, for example a brokerage house properly holding stock for a customer, *but* pledging that stock for its own loan. In neither of these cases is a demand for return a prerequisite to a conversion action. *Brandhorst v. Carondelet Savings & Loan Ass'n*, 625 S.W.2d 696 (Mo.App. E.D. 1981). The other common form of conversion also involves a rightful possession but the refusal to surrender possession of the property when demanded; *Knight v. M.H. Siegfried Real Estate, Inc.*, 647 S.W.2d 811 (Mo.App. W.D. 1982).

C. Actions for conversion are normally limited to personal property. However, money may be converted if it is placed in the custody of a party for a specific purpose and then misappropriated. *Dillard v. Payne*, 615 S.W.2d 53 (Mo. 1981).

D. Consent and abandonment are complete defenses to an action for conversion. Consent requires words or conduct permitting defendant to take or use the property; *Maples, supra*. Abandonment requires an intent to abandon and an external act by which the intent is carried out; *Chemical Sales Co. v. Diamond Chemical Co.*, 766 F.2d 364 (8th Cir. 1985). Generally, defendant's good faith, motive, lack of knowledge, or mistake of law is no defense to a conversion action. *Coffman v. Faulkner*, 591 S.W.2d 23 (Mo.App. E.D. 1979); *NIKA Corp. v. City of Kansas City, Mo.*, 582 F.Supp. 343 (W.D.Mo. 1983).

E. Actual damages in a conversion action are the reasonable market value at the time of the conversion. *Weldon v. Town Properties, Inc.*, 633 S.W.2d 196 (Mo.App. E.D. 1982). As an alternative measure, if property not "stock for sale" nor acquired by the owner in a conventional market, damages may be assessed as "what it will cost the owner to produce or acquire the property at the time of the conversion." *NIKA Corp., supra*. Punitive damages may be assessed upon a proper showing, though the "good faith" of the defendant may bar punitive recovery. *NIKA Corp., supra*. Where the property is returned before commencement of the lawsuit, the measure of damages is the depreciation in value of the personal property converted between the date of the conversion and the date of return; *Koch Fuels, Inc. v. Cargo of 13,000 Barrels of No. 2 Fuel Oil.*, 530 F.Supp. 1074 (D.C.Mo. 1981), aff'd 704 F.2d 1038 (8th Cir. 1983).

Research References

West's Key Number Digest
Trover and Conversion ⚷67

Annotations

1. In general

Evidence raised issue for jury on video rental chain's conversion claim against dealer of used video tapes and games; chain presented evidence establishing that it owned video tapes and games recovered from dealer's store, that it never offered seized merchandise for sale, and that all tapes and games seized from dealer's store carried chain's label, and other evidence indicated that dealer attempted to sell chain's property for his own financial gain, and that chain lost revenue during time its property was in dealer's possession. *Mertz v. Blockbuster, Inc.*, 32 S.W.3d 130 (Mo.App. E.D. 2000).

Verdict director for conversion which charges use of funds "for other purposes" than specified purpose follows model instruction for conversion. Verdict director for conversion that allowed finding of liability even if limited partner's promissory note payment was not diverted to general partner's personal use followed model instruction for conversion, since it instructed that general partner did not use payment for its intended purpose. *Stavrides v. Zerjav*, 927 S.W.2d 486 (Mo.App. E.D. 1996).

To establish ownership of allegedly converted property or entitlement to possession of that property, plaintiff must prove that he was either the owner or was entitled to immediate possession of the property at time of alleged conversion. *Fehrman v. Pfetzing*, 917 S.W.2d 600 (Mo.App. E.D. 1996).

23.12(2) [1989 New] Conversion—Failure to Surrender Possession

Your verdict must be for plaintiff if you believe:

First, plaintiff was *(here describe facts which entitled plaintiff to possession—e.g.—"the owner of the watch", "the lessee of the automobile")*, and

Second, defendant had possession of *(here describe the property)*, and

Third, plaintiff made a demand to defendant for possession of *(here describe the property)*, and

Fourth, thereafter defendant intentionally failed to return possession of *(here describe the property)* to plaintiff.

* [unless you believe that plaintiff is not entitled to recover by reason of Instruction No. ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1989 New)

* Add if affirmative defense is submitted.

Committee Comment (1989 New)

A. See MAI 32.27 for submission of the affirmative defense of abandonment.

B. See Committee Comment to MAI 23.12(1).

Research References

West's Key Number Digest
Trover and Conversion ⚷67

Annotations

1. In general

Towing services' refusal to deliver possession of trailer to owner upon tender of cashier's check for more than amount due for towing and storage was a "conversion" of the trailer. *Northland Insurance Co. v. Chet's Tow Service, Inc.*, 804 S.W.2d 54 (Mo.App. W.D. 1991).

23.13 [2012 Withdrawn] Retaliatory Discharge or Discrimination-Worker's Compensation

Historical Note

(MAI 23.13 (2000 New) and its related Notes on Use and Committee Comment have been withdrawn. All instructions related to Employment Discrimination have been collected in Chapter 38 of MAI-Civil. MAI 23.13 has been replaced by MAI 38.04 (2018 Revision)).

23.14 [2006 New] Employee's Breach of Duty of Loyalty

Your verdict must be for plaintiff if you believe:

First, defendant was employed by plaintiff, and

Second, while so employed, defendant *(here describe the act(s) alleged to be beyond mere planning and preparation for a competing enterprise that constitute direct competition with the plaintiff)*, and

Third, defendant thereby[1] went beyond mere planning and preparation and acted in direct competition with plaintiff, and

Fourth, as a direct result of such conduct, plaintiff sustained damage.

*[unless you believe plaintiff is not entitled to recover by reason of Instruction No. ________ *(here insert number of affirmative defensive instruction)*].

Notes on Use (2006 New)

1. If multiple acts are submitted, Paragraph Third should begin, "Third, defendant, in any one or more of the respects submitted in Paragraph Second, thereby . . ."

*Add if affirmative defense is submitted.

Committee Comment (2006 New)

A. In the case of *National Rejectors Inc. v. Trieman*, 409 S.W.2d 1, 41 (Mo.banc 1966), the Court, drawing on Restatement (2d) of Agency, implicitly recognized a separate cause of action for the breach of the duty of loyalty in the employer-employee relationship. See *Scanwell Freight Express STL, Inc. v. Chan*, 162 S.W.3d 477 (Mo.banc 2005). In *Scanwell*, the Court noted that in broad general terms an employee must not act contrary to the employer's interest. While an employee is allowed to agree with other employees to compete with their then employer upon termination of their employment, "it necessarily follows that a breach arises when the employee goes beyond the mere planning and preparation and actually engages in direct competition, which, by definition, is to gain advantage over the competitor." *Scanwell* at 479.

B. Restatement (2d) of Agency, § 393, cmt. e, further describes the kind of activities that can constitute a breach of duty of loyalty: "After termination of his agency, in the absence of restrictive agreement, the agent can properly compete with his principal as to matters for which he has been employed. See § 396. Even before the termination of the agency, he is entitled to make arrangements to compete, except that he cannot properly use confidential information peculiar to his employer's business and acquired therein. Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete. He is not, however, entitled to solicit customers for such rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business."

Research References

West's Key Number Digest
Labor and Employment 🔑111, 140(3)

Legal Encyclopedias
C.J.S., Employer-Employee Relationship §§ 150, 152

24.00

FEDERAL EMPLOYERS' LIABILITY ACT

24.01 Verdict Directing—Failure to Provide Safe Place to Work [Withdrawn 2008]
24.01(A) Verdict Directing—Constructive Knowledge Not In Issue—Failure to Provide Safe Place to Work
24.01(B) Verdict Directing—Constructive Knowledge Disputed—Failure to Provide Safe Place to Work
24.02 Verdict Directing—Locomotive Inspection Act Violation
24.03 Verdict Directing—Safety Appliance Act Violation
24.04(A) Affirmative Defense—Failure to Mitigate Damages
24.04(B) Affirmative Defense—Contributory Negligence
24.05 Withdrawal Instruction—Assumption of the Risk
24.06 Damages—Death of Employee
24.07 Damages—Injury to Employee

Research References

West's Key Number Digest
Labor and Employment ⚷2826, 2829

A.L.R. Library
A.L.R. Index, Assumption of Risk; Contributory Negligence; Labor and Employment
West's A.L.R. Digest, Labor and Employment ⚷2826, 2829

Legal Encyclopedias
C.J.S., Employers' Liability for Injuries to Employees §§ 406, 407

24.01 [2008 Withdrawn] Verdict Directing—Failure to Provide Safe Place to Work

(MAI 24.01 [1992 Revision] has been withdrawn and replaced by MAI 24.01(A) [2016 Revision] and MAI 24.01(B) [2016 Revision]).

Annotations

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1. In general

In action for failure to furnish "reasonably safe conditions for work" plaintiffs' verdict director erroneously submitted that ground without specifying a particular unsafe condition; further, the instruction erroneously allowed recovery if defendant's negligence resulted "in whole or in part" in plaintiff's injury since such "slight negligence" is actionable only in F.E.L.A. cases and MAI 24.01 is suitable only in those cases. *Ricketts v. Kansas City Stock Yards Co. of Maine*, 484 S.W.2d 216 (Mo.banc 1972).

Where defendant had constructive knowledge of condition complained of, it was unnecessary to hypothesize that defendant knew or could have known thereof. *Wilmoth v. Chicago, R.I. & P. Ry. Co.*, 486 S.W.2d 631 (Mo. 1972).

MAI 24.01 correctly provides as a basis of negligence the failure to provide reasonably safe appliances to workers under 45 U.S.C.A. § 51 of FELA; rails and switches in railroad yard are "appliances" under section of FELA imposing liability upon railroads for injuries to employees resulting from "any defect or insufficiency due to its negligence in its . . . appliances." *Gilliam v. Chicago & North Western Transp. Co.*, 859 S.W.2d 155 (Mo.App. W.D. 1993).

Approved negligence instruction has been endorsed for use in Federal Employers' Liability Act cases, and there was no error in utilizing it. *Robertson v. Burlington Northern R. Co.*, 785 S.W.2d 626 (Mo.App. E.D. 1990).

Railroad's contention that MAI 24.01 denied it equal protection of the laws in violation of the 14th Amendment because it singles out and imposes greater liability and burdens upon interstate railroad carriers than it does any other corporate or private individual defendant has been raised before and summarily rejected. *Anderson v. Burlington Northern R. Co.*, 700 S.W.2d 469 (Mo.App. E.D. 1985).

Verdict for recovery for "failure to provide reasonably safe tires" was too general and did not meet requirement that instruction require a finding of a "particular unsafe condition." *Searcy v. Neal*, 509 S.W.2d 755 (Mo.App. 1974).

2. Scope of employment

Where as a matter of law evidence showed employee was acting within the scope of his employment it was unnecessary to hypothesize that element in his verdict director. *Elliott v. St. Louis Southwestern Ry. Co.*, 487 S.W.2d 7 (Mo. 1972).

3. Modification

Railroad worker made a submissible case under FELA where the laborer was injured crossing an ice-covered trestle. MAI 24.01 should be modified to include a submission on the actual or constructive knowledge on the part of the railroad with respect to the existence of the dangerous condition where that knowledge is in dispute. *Qualls v. St. Louis Southwestern Ry. Co.*, 799 S.W.2d 84 (Mo.banc 1990).

Where plaintiff sought damages for a November 9, 1966 back injury and his evidence showed two earlier back injuries, MAI should have been modified by deleting the words "mentioned in evidence" and substituting therefore the words "of November 9, 1966." Plaintiff's verdict director should have been similarly modified. *Russell v. Terminal R.R. Ass'n*, 501 S.W.2d 843 (Mo.banc 1973).

Trial court had duty, in railroad employee's personal injury action against railroad under

FELA, to give version of jury instruction regarding the failure to provide safe place to work that conformed to language of applicable Missouri Approved Instruction (MAI) and its Notes on Use, which referred to the allegedly unsafe circumstances of employee's workplace as "conditions for work," rather than employee's proffered phrase "methods for work"; the MAI instruction did not misstate the law and was supported by the evidence, and employee was still permitted to fully argue his "unsafe method" theory. *Clark v. Missouri & Northern Arkansas R.R. Co., Inc.*, 157 S.W.3d 665 (Mo.App. W.D. 2004).

In instructing jury in Jones Act action on whether towboat owner was negligent for failing to provide reasonably safe methods of work, trial court was not required to include as a material element owner's actual or constructive knowledge of condition which allegedly made work methods unsafe; owner was charged with constructive knowledge of failing to provide reasonably safe methods of work and was not charged with knowledge of existence of condition of defective rubber bumper. *Futrell v. Luhr Bros., Inc.*, 916 S.W.2d 348 (Mo.App. E.D. 1996).

In action by employee against railroad for injuries sustained in fall while getting off elevator in railroad's office building, evidence concerning railroad's knowledge of continuing defect after visit by elevator repairman was sufficiently disputed to create issue of fact which should have been submitted to the jury, and thus trial court erred in failing to modify verdict director instruction to present that issue. *Henry v. Union Pacific Systems*, 875 S.W.2d 212 (Mo.App. E.D. 1994).

Evidence in FELA action was sufficient to show that railroads had actual or constructive notice of cramped condition within locomotive which led to boilermaker's injury while attempting to install bolt, so that railroads were not entitled to modification of verdict directing instruction to insert separate paragraph requiring finding that railroads knew or by using ordinary care should have known of condition and that it was reasonably likely to cause substantial harm; railroads were chargeable with knowledge of the physical dimensions and location of the bolts on their own locomotives and with procedures used by their employees. *Holley v. Missouri Pacific Railroad Co.*, 867 S.W.2d 610 (Mo.App. E.D. 1993).

In employee's negligence action against his tree cutter employers arising when tree felled by one of his employers allegedly struck another tree that in turn struck employee, verdict directing instruction which described series of events leading up to injury but which did not require jury to find particular unsafe act or omission on part of employers that caused injury was erroneous. In dicta, court stated that a modified FELA instruction would not be appropriate for use in a non-FELA, injured employee case. *Karnes v. Ray*, 809 S.W.2d 738 (Mo.App. S.D. 1991).

It was proper for a court to submit constructive knowledge element in third paragraph of jury instruction in railroad employee's Federal Employers' Liability Act case in which employee failed to prove level or duration of noise which could cause injury; where cause of injury could not be said to be commonly known as one that could cause injury shown, employee had burden of proof to show railroad knew or should have known condition was capable of producing injury, even if condition was included in one of specifications for negligence included in jury instruction. *Turner v. Norfolk & Western Ry. Co.*, 785 S.W.2d 569 (Mo.App. W.D. 1990).

In FELA case not involving violation of a safety rule, verdict-directing instruction must include finding of defendant's constructive knowledge of dangerous condition. *White v. St. Louis-San Francisco Ry. Co.*, 539 S.W.2d 565 (Mo.App. 1976).

4. Conversing

Plaintiff's verdict director properly followed MAI 24.01 in submitting that defendant's negligence directly resulted "in whole or in part" in injury to plaintiff. Defendant's converse required that plaintiff sustained damage as a "direct result" of its negligence; held, prejudicially erroneous, since it did not substantially follow the language of the verdict director. *Snyder v. Chicago, R.I. & P. Ry. Co.*, 521 S.W.2d 161 (Mo.App. 1973).

5. Roving commission

MAI 24.01 as a verdict director does not give the jury a roving commission. *Ball v. Burlington Northern R. Co.*, 672 S.W.2d 358 (Mo.App. E.D. 1984).

6. Measure of damages

Propriety of jury instructions concerning measure of damages in FELA action is issue of substance determined by federal law, and thus fact that instruction on given subject is not to be found in MAI is not dispositive. *Holley v. Missouri Pacific Railroad Co.*, 867 S.W.2d 610 (Mo.App. E.D. 1993).

Assuming that defendants in FELA action were entitled to submit separate, not-in-MAI instruction on mitigation of damages, instruction tendered was improper where it was abstract in that it did not require any finding by jury or inform jury of how instruction was to impact any finding they were to make, provided no guidance with respect to which party bore burden of proof, was argumentative in purporting to inform jury of what was "required by law," and portion stating that plaintiff was required to try "to eliminate * * * any loss of earnings" was not supported by evidence indicating only that plaintiff might have reduced or ended loss of earnings. *Holley v. Missouri Pacific Railroad Co.*, 867 S.W.2d 610 (Mo.App. E.D. 1993).

7. Knowledge

If the judge in a negligence action brought under the Federal Employers Liability Act (FELA) decides the plaintiff has shown that defendant railroad had actual knowledge of the negligently produced condition, an additional paragraph in the jury instruction on negligence that submits the defendant's knowledge to the jury is not required. *Cupp v. National R.R. Passenger Corp.*, 138 S.W.3d 766 (Mo.App. E.D. 2004).

Evidence was sufficient to show that railroad had actual or constructive knowledge that wheel wash operation, which led to employee's injury, was dangerous condition, and thus, jury instruction on negligence did not require modification to submit railroad's knowledge of the dangerous condition to the jury; supervisor reported wheel retarders were not slowing wheels exiting from wash, several employees warned supervisors of danger from wheels ejected from wash, and railroad knew that wheel wash would continue to be operated by seller's employees in making adjustments to wash. *Cupp v. National R.R. Passenger Corp.*, 138 S.W.3d 766 (Mo.App. E.D. 2004).

24.01(A) [2016 Revision] Verdict Directing—Constructive Knowledge Not In Issue—Failure to Provide Safe Place to Work

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant,[1] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[2] and

Third,[3] defendant either failed to provide:

reasonably safe conditions for work, or

reasonably safe [appliances],[4] or

reasonably safe methods of work, or

reasonably adequate help, and[5]

Fourth, defendant in any one or more of the respects submitted in Paragraph Third was negligent,[6,7] and

Fifth, such negligence[6] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[8]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ____ *(here insert number of affirmative defense instruction)*].

Notes on Use (2016 Revision)

1. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

2. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

3. The specifications of negligence set forth in this instruction concern conditions of which the defendant had constructive knowledge. See MAI 24.01(B) for cases in which constructive knowledge is disputed.

4. The term "equipment" or any other statutory term used in 45 U.S.C. § 51 may be substituted for the word "appliances."

5. In the event that the negligence charged is based upon the acts of the defendant's employee, the following alternate paragraphs Third and Fourth must be used.

> "Third, defendant's employee *(characterize the negligent conduct, i.e., failed to keep a careful lookout, etc.)*, and"

> "Fourth, defendant's employee was thereby negligent, and"

6. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

7. In the event that there is only a single submission of negligence under paragraph Third, then paragraph Fourth must be modified to read as follows:

> "Fourth, defendant was thereby negligent, and"

8. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. Do not use this bracketed phrase to submit contributory negligence or failure to mitigate damages in an F.E.L.A. case, which are partial defenses. See MAI 24.04(A) and (B).

Committee Comment (2016 Revision)

A. In F.E.L.A. cases, common law negligence rules are controlling *except* that these rules have been modified by F.E.L.A. Because of the "in whole or in part" language of the statute (Title 45, U.S.C.A., § 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the *slightest* cause of the employee's injury. *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

B. In the traditional negligence case, it is mandatory for the plaintiff to include the word "direct" or "directly" in the verdict directing instruction because of the proximate (direct) cause requirements. This prevents the jury from awarding damages or finding for plaintiff because of some indirectly contributing causative factors. This is not so with F.E.L.A. The F.E.L.A. "was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 507, 77 S.Ct. 443, 1 L.Ed.2d 493. The test of a jury case under F.E.L.A. is simply "whether the proofs justify within reason the conclusion that employer's negligence played *any part, even the slightest*, in producing injury or death for which damages are sought." (emphasis added.) *Rogers v. Mo.*

Pac. Ry., 352 U.S. at 506, 77 S.Ct. 443, 1 L.Ed.2d 493. The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. *Heater v. Chesapeake & O. Ry. Co.*, 497 F.2d 1243, 1246 (7th Cir. 1974).

C. As the United States Supreme Court has stated in *Rogers v. Missouri Pac. Ry.*, in an F.E.L.A. case, the employer railroad is stripped of its common law defenses. The statute is an avowed departure from the rules of common law. Our state Supreme Court has consistently held that the federal interpretation of F.E.L.A. is binding on the Missouri state courts. *Headrick v. Kansas City Southern Ry. Co.*, 305 S.W.2d 478 (Mo. 1957); *Adams v. Atchison, T. & S.F. Ry.*, 280 S.W.2d 84 (Mo. 1955).

D. In *Cluck v. Union Pacific R.R. Co.*, 367 S.W.3d 25 (Mo.banc 2012), the Court considered the applicability of the doctrine of respondeat superior liability in F.E.L.A. actions. The Court rejected plaintiff's contention that respondeat superior liability does not apply in F.E.L.A. cases. In so doing, the Court rejected plaintiff's further argument that the test for liability was merely a temporal test of whether the employee causing the injury was generally acting within the course and scope of employment at the time of the incident.

E. If *respondeat superior* liability is an issue, refer to Chapter 13 generally and specifically the definition at MAI 13.05.

F. These instructions may also be considered for use in cases brought under the Jones Act, 46 U.S.C. Appx. § 688(a). *See, e.g., Futrell v. Luhr Bros., Inc.*, 916 S.W.2d 348 (Mo.App. E.D. 1996).

Research References

West's Key Number Digest
Labor and Employment ⚷2829

24.01(B) [2016 Revision] Verdict Directing—Constructive Knowledge Disputed—Failure to Provide Safe Place to Work

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant,[1] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[2] and

Third,[3] conditions for work were not reasonably safe and defendant knew or by using ordinary care[4] could have known of such conditions and that they were not reasonably safe, and

Fourth, with respect to such conditions for work, defendant either failed to provide:

reasonably safe conditions for work, or

reasonably safe [appliances],[5] or

reasonably safe methods of work, or

reasonably adequate help, and

Fifth, defendant in any one or more of the respects submitted in Paragraph Fourth was negligent,[4] and[6]

Sixth, such negligence[4] resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[7]

*[unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (2016 Revision)

1. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

2. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

3. MAI 24.01(B) is to be used in cases in which constructive knowledge of the railroad is disputed. *Qualls v. St. Louis SW Ry. Co.*, 799 S.W.2d 84 (Mo.banc 1990), cert. denied 499 U.S. 961, 111 S.Ct. 1585, 113 L.Ed.2d 650 (1991). This instruction should not be used "if the judge decides the plaintiff has shown defendant had actual knowledge of the negligently produced condition." *Qualls*, 799 S.W.2d at 87.

4. The terms "negligent" and "negligence" must be defined. The term "ordinary care" must be defined. See definitions in Chapter 11.00.

5. The term "equipment" or any other statutory term used in 45 U.S.C. § 51 may be substituted for the word "appliances."

6. In the event that there is only a single submission of negligence under paragraph Fourth, then paragraph Fifth must be modified to read as follows:

"Fifth, defendant was thereby negligent, and"

7. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. Do not use this bracketed phrase to submit contributory negligence or failure to mitigate damages in an F.E.L.A. case, which are partial defenses. See MAI 24.04(A) and (B).

Committee Comment (2016 Revision)

A. In F.E.L.A. cases, common law negligence rules are controlling *except* that these rules have been modified by F.E.L.A. Because of the "in whole or in part" language of the statute (Title 45, U.S.C.A., § 51), the traditional doctrine of proximate (direct) cause is not applicable. A railroad is liable if its negligence is only the *slightest* cause of the employee's injury. *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

B. In the traditional negligence case, it is mandatory for the plaintiff to include the word "direct" or "directly" in the verdict directing instruction because of the proximate (direct) cause requirements. This prevents the jury from awarding damages or finding for plaintiff because of some indirectly contributing causative factors. This is not so with F.E.L.A. The F.E.L.A. "was enacted because the Congress was dissatisfied with the common law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence." *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 507, 77 S.Ct. 443, 1 L.Ed.2d 493. The test of a jury case under F.E.L.A. is simply "whether the proofs justify within reason the conclusion that employer's negligence played *any part, even the slightest*, in producing injury or death for which damages are sought." (emphasis added.) *Rogers v. Mo.*

Pac. Ry., 352 U.S. at 506, 77 S.Ct. 443, 1 L.Ed.2d 493. The fact that there may have been a number of causes of the injury is, therefore, irrelevant as long as one cause may be attributable to the railroad's negligence. *Heater v. Chesapeake & O. Ry. Co.*, 497 F.2d 1243, 1246 (7th Cir.1974).

C. As the United States Supreme Court has stated in *Rogers v. Missouri Pac. Ry.*, in an F.E.L.A. case, the employer railroad is stripped of its common law defenses. The statute is an avowed departure from the rules of common law. Our state Supreme Court has consistently held that the federal interpretation of F.E.L.A. is binding on the Missouri state courts. *Headrick v. Kansas City Southern Ry. Co.*, 305 S.W.2d 478 (Mo. 1957); *Adams v. Atchison, T. & S.F. Ry.*, 280 S.W.2d 84 (Mo. 1955).

D. In *Cluck v. Union Pacific R.R. Co.*, 367 S.W.3d 25 (Mo.banc 2012), the Court considered the applicability of the doctrine of respondeat superior liability in F.E.L.A. actions. The Court rejected plaintiff's contention that respondeat superior liability does not apply in F.E.L.A. cases. In so doing, the Court rejected plaintiff's further argument that the test for liability was merely a temporal test of whether the employee causing the injury was generally acting within the course and scope of employment at the time of the incident.

E. If *respondeat superior* liability is an issue, refer to Chapter 13 generally and specifically the definition at MAI 13.05.

F. These instructions may also be considered for use in cases brought under the Jones Act, 46 U.S.C. Appx. § 688(a). *See, e.g., Futrell v. Luhr Bros., Inc.*, 916 S.W.2d 348 (Mo.App. E.D. 1996).

Research References

West's Key Number Digest
Labor and Employment 🔑2829

24.02 [2016 Revision] Verdict Directing—Locomotive Inspection Act Violation

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant,[1] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[2] and

Third, defendant [used on its line] [permitted use on its line of][3] a locomotive, and

Fourth, the locomotive was not in proper condition and not safe to operate without unnecessary danger of personal injury, and

Fifth, this condition resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[3]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ____ *(here insert number of affirmative defense instruction)*].

Notes on Use (2016 Revision)

1. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

2. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

3. Select the appropriate phrase.

* Add if a complete affirmative defense is submitted. This bracketed material should not be used to submit contributory negligence or failure to mitigate damages. Further, contributory negligence is not available for this statutory violation. F.E.L.A. provides, in part, that "no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U.S.C. § 53.

Committee Comment (2016 Revision)

A. The Locomotive Inspection Act, 49 U.S.C. §§ 20102, 20107 (1994) was formerly known as The Boiler Inspection Act, 45 U.S.C § 23.

B. Regulations promulgated pursuant to this authority are found in Title 49 of the Code of Federal Regulations under the Federal Railroad Administration (F.R.A.) regulations.

C. When a case presents issues of both statutory violations (under the Locomotive Inspection Act or the Safety Appliance Acts) and general negligence, see MAI Illustration 35.15 for a sample verdict form that combines both a strict liability claim and a negligence claim. See *Host v. BNSF Ry. Co.*, 460 S.W.3d 87 (Mo.App. W.D. 2015), where it was held to be error to submit multiple theories seeking to recover the same damages in two instruction packages employing two verdict forms.

Research References

West's Key Number Digest
Labor and Employment ⚷2829

24.03 [2016 Revision] Verdict Directing—Safety Appliance Act Violation

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant,[1] and

Second, a part of plaintiff's employment in some way closely and substantially affected interstate commerce,[2] and

Third, defendant [used on its line] [permitted use on its line of][3] a [car] [train] [engine][3] that *(here set out the Safety Appliance Act violation)*, and

Fourth, this use resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[3]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ____ *(here insert number of affirmative defense instruction)*].

Notes on Use (2016 Revision)

1. Paragraph First will seldom be in issue. Omit the entire paragraph First if not in dispute.

2. Paragraph Second will seldom be in issue. Omit the entire paragraph Second if not in dispute.

3. Select the appropriate phrase or term.

* Add if a complete affirmative defense is submitted. This bracketed material should not be used to submit contributory negligence or failure to mitigate damages. Further, contributory negligence is not available for this statutory violation. F.E.L.A. provides, in part, that "no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." 45 U.S.C. § 53.

Committee Comment (2016 Revision)

A. The Safety Appliance Act, 49 U.S.C. §§ 20301–20304, 21302, 21304 (1994), was recodified from 45 U.S.C. §§ 1–16.

B. When a case presents issues of both statutory violations (under the Locomotive Inspection Act or the Safety Appliance Acts) and general negligence, see MAI Illustration 35.15 for a sample verdict form that combines both a strict liability claim and a negligence claim. See *Host v. BNSF Ry. Co.*, 460 S.W.3d 87 (Mo.App. W.D. 2015), where it was held to be error to submit multiple theories seeking to recover the same damages in two instruction packages employing two verdict forms.

Research References

West's Key Number Digest
Labor and Employment ⚷2829

24.04(A) [2012 Revision] Affirmative Defense—Failure to Mitigate Damages

If you find in favor of plaintiff, you must find that plaintiff failed to mitigate damages if you believe:

First, plaintiff *(insert act sufficient to constitute failure to mitigate, such as "failed to return to work")*, and

Second, plaintiff thereby failed to use ordinary care[1], and[2]

Third, plaintiff thereby sustained damage which would not have occurred otherwise.

Notes on Use (1996 New)

1. The term "ordinary care" must be defined. See definitions in Chapter 11.00.

2. If more than one specification of failure to mitigate damages is appropriately submitted, modify Paragraph First to submit such specifications in the disjunctive and modify Paragraph Second to read:

> "Second, plaintiff, in one or more of the respects submitted in Paragraph First, thereby failed to use ordinary care, and"

Committee Comment (1996 New)

A. Federal substantive law governs F.E.L.A. cases adjudicated in *State Court. St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411, 105 S.Ct. 1347, 1348, 84 L.Ed.2d 303, 306 (1985). Under federal law, plaintiff's failure to mitigate damages is an affirmative defense which must be pleaded and proved by defendant, and defendant is entitled to a separate instruction on mitigation of damages if supported by substantial evidence. *Kauzlarich v. Atchison, Topeka, and Santa Fe Ry. Co.*, 910 S.W.2d 254 (Mo.banc 1995).

B. See MAI 24.07 for appropriate modification of the damage instruction in an F.E.L.A. case in which failure to mitigate damages is submissible.

Historical Note

(MAI 24.04(A) replaces the prior MAI 32.07(A) from the 6th Edition).

Research References

West's Key Number Digest
Labor and Employment ⚷2829

Annotations

In general 1
Verdict for defendant 2

1. In general

An instruction on failure to mitigate damages can be given when there is sufficient evidence to support it. *Burbridge v. Union Pacific R. Co.*, 413 S.W.3d 649 (Mo.App. E.D. 2013).

2. Verdict for defendant

If the jury returns a verdict in favor of the defendant, it will have no reason to consider an instruction on failure to mitigate damages. *Burbridge v. Union Pacific R. Co.*, 413 S.W.3d 649 (Mo.App. E.D. 2013).

24.04(B) [2012 Revision] Affirmative Defense—Contributory Negligence

You must find plaintiff contributorily negligent if you believe:

First, plaintiff *(characterize the act of negligence, such as "failed to keep a lookout for oncoming trains")*, and

Second, plaintiff was thereby negligent,[1] and[2]

Third, such negligence[1] of plaintiff resulted in whole or in part in [injury to plaintiff] [the death of *(decedent's name)*].[3]

Notes on Use (2008 Revision)

1. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

2. If more than one specification of negligence is submitted, modify Paragraph First to submit such specifications in the disjunctive and modify Paragraph Second to read:

> "Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and"

3. Select the appropriate phrase.

If contributory negligence is submitted, see MAI 24.06 and 24.07 for appropriate modification of the damage instruction in an F.E.L.A. case.

Committee Comment (2016 Revision)

A. This instruction is revised to comply with *Norfolk Southern Railway Co. v. Sorrell*, 549 U.S. 158, 127 S.Ct. 799 (2007).

B. Unlike "contributory negligence" as it was applied in non-F.E.L.A. cases prior to the adoption of comparative fault principles, contributory negligence under the F.E.L.A. did not bar plaintiff's recovery, but required a pro rata reduction. *See* 45 U.S.C. § 53, which provides: "the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee . . ."

C. Section 53 goes on to state: "Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." The Boiler Inspection Act (now the Locomotive Inspection Act) and the Federal Safety Appliance Acts have been held to be such enactments; thus, the defense is not available in cases arising thereunder.

Historical Note

(MAI 24.04(B) replaces the prior MAI 32.07(B) from the 6th Edition).

Research References

West's Key Number Digest
Labor and Employment ⚷2829

Legal Encyclopedias
C.J.S., Employers' Liability for Injuries to Employees § 407

24.05 [2012 Revision] Withdrawal Instruction—Assumption of the Risk

Plaintiff does not assume any of the risks of plaintiff's employment. This matter is withdrawn from the case and you are not to consider such evidence in arriving at your verdict.

Notes on Use (1978 New)

This instruction may only be given if the false issue of assumption of the risk is injected in the case. See the General Comment regarding Withdrawal Instructions at MAI 34.01.

Historical Note

(MAI 24.05 replaces the prior MAI 34.04 from the 6th Edition).

Research References

West's Key Number Digest
Labor and Employment ⚷2829

Legal Encyclopedias
C.J.S., Employers' Liability for Injuries to Employees § 406

Annotations

1. In general

Trial court did not abuse its discretion in refusing to give railroad worker's proffered instruction that assumption of risk was not at issue in worker's suit under Federal Employers' Liability Act against railroad, where issue of assumption of risk had not been raised by railroad. *Rowe v. Norfolk & Western Ry. Co.*, 787 S.W.2d 751 (Mo.App. E.D. 1990).

24.06 [2012 Revision] Damages—Death of Employee

If you find in favor of the plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate *(here identify the beneficiaries)* for any damages you believe [he] [she] [they] [and decedent][1] sustained [and *(here identify the beneficiaries)* are reasonably certain to sustain in the future][2] as a direct result of the fatal injury to *(name of decedent)*. Any award of future pecuniary damages must be included at present value. [Any award you may make is not subject to income tax.][3] [If you find decedent contributorily negligent as submitted in Instruction Number ________, then your award must be determined by diminishing total damages in proportion to the amount of negligence attributable to decedent.][4]

You must not consider grief or bereavement suffered by reason of the death.

Notes On Use (1996 Revision)

1. Use bracketed phrase where the evidence supports the submission of damages to decedent between the time of injury and the time of death, i.e. pain and suffering.

2. This may be added if supported by the evidence.

3. If requested this bracketed sentence must be given. See *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

4. If contributory negligence is submitted the damage instruction must be modified by adding this bracketed sentence. See MAI 24.04(B) for the appropriate contributory negligence instruction in an F.E.L.A. case.

If the law and facts permit a mitigation of damages submission in an F.E.L.A. death case, see MAI 24.07 and 24.04(A) for the appropriate method of submission of failure to mitigate damages.

Committee Comment (2017 Revision)

A. This instruction is used only in F.E.L.A. cases wherein the employee was fatally injured. The reference to present value is used in F.E.L.A. cases in compliance with *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). *Dicker-*

son clearly requires inclusion of the sentence relating to present value if requested. It is not clear under *Dickerson* whether it is error to omit the present value sentence if inclusion is not requested.

B. The submission of comparative fault in an F.E.L.A. case differs from the method in Chapter 37.00 for use in cases based on Missouri law. F.E.L.A. cases are governed by federal law. Under 45 U.S.C.A. § 53, the *jury* diminishes damages in proportion to the employee's negligence. Under Chapter 37.00, the jury determines *total damages* and plaintiff's percentage of fault but the *judge* makes the actual computation diminishing total damages to the amount recoverable by plaintiff. If the parties agree, the case may be submitted in accordance with the principles described in Chapter 37.00, as is done in other jurisdictions.

C. During the instruction conference, the parties and the court should discuss, on the record, what damages are supported by the evidence and can properly be argued to the jury. In F.E.L.A. wrongful death cases, recovery is limited to pecuniary losses. See *American Railroad Co. of Porto Rico v. Didricksen*, 227 U.S. 145 (1912); *Michigan Central R. Co. v. Vreeland*, 227 U.S. 59 (1913); *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990). In this way, jury arguments can proceed without undue interruptions.

Historical Note

(MAI 24.06 replaces the prior MAI 8.01 from the 6th Edition).

Research References

West's Key Number Digest
Labor and Employment ⚷2826

24.07 [2012 Revision] Damages—Injury to Employee

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][1] as a result of the occurrence[2] mentioned in the evidence. [In determining plaintiff's damages, you may include an amount to compensate plaintiff for the fear of cancer if you believe that such fear is genuine and serious.][3] Any award of future pecuniary damages must be included at present value. [Any award you make is not subject to income tax.][4] [If you find that plaintiff failed to mitigate damages as submitted in Instruction Number ________, in determining plaintiff's total damages you must not include those damages that would not have occurred without such failure.][5] [If you find plaintiff contributorily negligent as submitted in Instruction Number ________, then your award must be determined by diminishing plaintiff's total damages in proportion to the amount of negligence attributable to plaintiff.][6]

Notes on Use (2010 Revision)

1. This bracketed phrase may be added if supported by the evidence.

2. When the term "occurrence" must be modified, substitute some descriptive term that specifically describes the compensable event or conduct. For example, if the plaintiff claims that he was injured in a fall which occurred at work but the defendant claims that the injury did not result from the fall but rather resulted from a non-compensable automobile accident, the instruction may be modified to read "as a result of the fall on (the date of the compensable event)."

3. Add this bracketed sentence where the evidence supports submission of compensability of plaintiff's fear of the future risk of contracting cancer in accordance with *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 129 S. Ct. 2139, 173 L. Ed. 2d 1184 (2009).

4. If requested, this bracketed sentence must be given. See *Norfolk & Western Ry. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

5. If failure to mitigate damages is submitted, the damages instruction must be modified by adding this bracketed sentence. See MAI

24.04(A) for the appropriate method of submission of failure to mitigate damages in an F.E.L.A. case. *Kauzlarich v. Atchison, Topeka, and Santa Fe Ry. Co.*, 910 S.W.2d 254 (Mo.banc 1995).

6. If contributory negligence is submitted, the damages instruction must be modified by adding this bracketed sentence. See MAI 24.04(B) for the appropriate contributory negligence instruction in an F.E.L.A. case.

Committee Comment (2017 Revision)

A. The reference to present value is used in F.E.L.A. cases in compliance with *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985). *Dickerson* clearly requires inclusion of the sentence relating to present value if requested. It is not clear under *Dickerson* whether it is error to omit the present value sentence if inclusion is not requested.

B. The submission of comparative fault in an F.E.L.A. case differs from the method in Chapter 37.00 for use in cases based on Missouri law. F.E.L.A. cases are governed by federal law. Under 45 U.S.C. § 53, the *jury* diminishes damages in proportion to the employee's negligence. Under Chapter 37.00, the jury determines *total damages* and plaintiff's percentage of fault but the *judge* makes the actual computation diminishing total damages to the amount recoverable by plaintiff. If the parties agree, the case may be submitted in accordance with the principles described in Chapter 37.00, as is done in other jurisdictions.

C. This instruction is used only in F.E.L.A. cases where the employee sustained injury. Other than the references to taxation, present value, and mitigation of damages, it is essentially the same as MAI 4.01 with the exception that the word "direct" is deleted from the fifth line of MAI 4.01. This is required in an F.E.L.A. case so that the instruction complies with the substantive law set forth in *Wilmoth v. Chicago, Rock Island & P.R. Co.*, 486 S.W.2d 631 (Mo. 1972); *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164, 89 S.Ct. 1706, 23 L.Ed.2d 176 (1969); and *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957).

Historical Note

(MAI 24.07 replaces the prior MAI 8.02 from the 6th Edition).

Research References

West's Key Number Digest
Labor and Employment ⚷2826

Annotations

In general 6
"Any damages" 7
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Income tax 5
Multiple events 1
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1. Multiple events

Trial court was not required to modify MAI 8.02, even though there was some evidence at trial that the claimant had sustained multiple injuries prior to the date of the accident. *Bair v. St. Louis-San Francisco Ry. Co.*, 647 S.W.2d 507, 510 (Mo.banc 1983).

Where there is a dispute in the evidence as to which of more than one event caused plaintiff's injury, MAI 8.02 should be modified to confine the jury's consideration of damages to the event asserted by the plaintiff as the basis for the defendant's liability. Furthermore, Notes on Use require the specification of the date of the incident for which the railroad is responsible in all cases where more than one event is claimed to be the cause of the claimant's injury. *Dickerson v. St. Louis Southwestern Ry. Co.*, 674 S.W.2d 165 (Mo.App. E.D. 1984), reversed on other grounds 470 U.S. 409, 105 S.Ct. 1347, 84 L.Ed.2d 303 (1985).

2. Present value

Either plaintiff or defendant in FELA case may offer present value evidence, but regardless of whether such evidence is offered, subject is open to jury instruction if requested and to jury argument; absent contrary indication, Supreme Court could assume that each juror complied with instruction and determined present value of future wage loss when returning general verdict in FELA suit. *Anglim v. Missouri Pacific Railroad Co.*, 832 S.W.2d 298 (Mo.banc 1992).

3. Comparative fault

In a case arising under FELA, where comparative fault was in issue, MAI 8.02 was applicable and was therefore required to be given. *Gilliam v. Chicago & North Western Transp. Co.*, 859 S.W.2d 155 (Mo.App. W.D. 1993).

4. Constitutionality

Railroad waived appellate review of claim that manner in which trial court instructed jury to diminish total damages by comparative fault in FELA case pursuant to MAI 8.02 violated Missouri constitution's due process, equal protection, and supremacy clauses; railroad did not cite to provisions of Missouri constitution that were allegedly violated and did not argue how those provisions were violated, but limited argument portion of brief to discussion of alleged violation of federal law and federal constitution. *Giddens v. Kansas City Southern Railway Company*, 29 S.W.3d 813 (Mo.banc 2000).

Railroad failed to preserve for appellate review its claim that federal due process clause was violated without means of determining whether jury correctly diminished employee's total damages by amount of his negligence, pursuant to MAI 8.02, where same argument was not made to trial court below in FELA proceeding. *Giddens v. Kansas City Southern Railway Company*, 29 S.W.3d 813 (Mo.banc 2000).

5. Income tax

The verdict form may need to be modified in light of *BNSF Railway Company v. Loos*, 139 S. Ct. 893, 203 L. Ed. 2d 160 (2019) where a railroad's payment to an employee for working time lost due to an on-the-job injury was taxable "compensation" under the Railroad Retirement Tax Act (RRTA), and Internal Revenue Code's (IRC) exclusion of personal injury damages from federal income taxation did not exempt F.E.L.A. damages from RRTA's income and excise taxes.

Instruction that injured locomotive engineer's wage loss must be calculated from engineer's after-tax income was not warranted in FELA action, where jury was instructed that any award to engineer was not subject to income tax. *Ramsey v. Burlington Northern and Santa Fe Ry. Co.*, 130 S.W.3d 646 (Mo.App. E.D. 2004).

6. In general

The use of instructions approved by the Missouri Supreme Court for use in FELA cases is mandatory to the exclusion of all others. *Burbridge v. Union Pacific R. Co.*, 413 S.W.3d 649 (Mo.App. E.D. 2013).

If approved instruction governing damages for an injury to an employee in FELA case is applicable, it must be given because the use of instructions approved by the Missouri Supreme Court for use in FELA cases is mandatory to the exclusion of all others. *Hedgecorth v. Union Pacific R. Co.*, 210 S.W.3d 220, (Mo.App. E.D. 2006).

Since approved instruction governing damages for an injury to an employee was given in FELA action, any further explanation by instruction was not acceptable procedure. *Hedgecorth v. Union Pacific R. Co.*, 210 S.W.3d 220, (Mo.App. E.D. 2006).

Since approved instruction governing damages for an injury to an employee was given in FELA action, any further explanation by instruction was not acceptable procedure. *Hedgecorth v. Union Pacific R. Co.*, 210 S.W.3d 220, (Mo.App. E.D. 2006).

7. "Any damages"

Approved instruction governing damages for an injury to an employee in FELA action allowed railroad employee's counsel to argue the facts of pain and suffering to the jury, including emotional distress, and emotional distress resulting from railroad employee's fear of developing cancer was submitted by the "any damages" language in approved instruction, and the detail of these damages was reserved for counsel's argument. *Hedgecorth v. Union Pacific R. Co.*, 210 S.W.3d 220 (Mo.App. E.D. 2006).

8. Verdict for defendant

If the jury returns a verdict in favor of the defendant, it will have no reason to consider a damages instruction. *Burbridge v. Union Pacific R. Co.*, 413 S.W.3d 649 (Mo.App. E.D. 2013).

25.00

VERDICT DIRECTING—BREACH OF WARRANTY AND PRODUCT LIABILITY

25.01 Breach of Warranty of Title to Personalty
25.02 Breach of Common Law Implied Warranty of Fitness for Consumption
25.03 Breach of Common Law Implied Warranty of Fitness for a Particular Purpose Under Uniform Commercial Code
25.04 Strict Liability—Product Defect
25.05 Strict Liability—Failure to Warn
25.06 Verdict Directing—Products Liability—Negligently Furnishing Dangerous Instrumentality or Product [Withdrawn 1990]
25.07 Breach of Express Warranty Under Uniform Commercial Code
25.08 Breach of Implied Warranty of Merchantability Under Uniform Commercial Code
25.09 Product Liability—Negligent Manufacture, Design, or Failure to Warn
25.10(A) Negligently Supplying Dangerous Instrumentality
25.10(B) Negligently Supplying Dangerous Instrumentality for Supplier's Business Purposes

Research References

West's Key Number Digest

Products Liability 🔑420, 423, 425 to 427

A.L.R. Library

A.L.R. Index, Implied Warranties; Instructions to Jury; Merchantability Warranty; Products Liability; Strict Liability
West's A.L.R. Digest, Products Liability 🔑420, 423, 425 to 427

Legal Encyclopedias

C.J.S., Products Liability §§ 282, 285

25.01 [1981 Revision] Breach of Warranty of Title to Personalty

Your verdict must be for plaintiff if you believe:

First, defendant sold *(describe the property)* to plaintiff, and

Second, at the time of such sale the *(describe the property)* was in defendant's possession, and

Third, at the time of such sale defendant did not have title to the *(describe the property)*, and

Fourth, plaintiff was thereby damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1981 New)

* Add if affirmative defense is submitted.

Committee Comment (1965 New)

A. In *Schaefer v. Fulton Iron Works Co.*, 158 S.W.2d 452, 455 (Mo.App. 1942), the court said: ". . . [W]hen personal property is sold at a fair price, there is an implied warranty of title; and, when there is a breach of such warranty, a cause of action arises in favor of the one thereby suffering damage and against the warrantor by reason of such breach."

B. In *Ivester v. E.B. Jones Motor Company*, 311 S.W.2d 109, 111 (Mo.App. 1958), the court said: "There appears to be no dispute about the general rule that there is an implied warranty of title when goods are in possession of a seller at the time of sale." The case also discusses seller's duty to come in and defend purchaser's title and the measure of purchaser's damages.

Research References

West's Key Number Digest
Products Liability 🔑420

Legal Encyclopedias
C.J.S., Products Liability § 282

25.02 [1981 Revision] Breach of Common Law Implied Warranty of Fitness for Consumption

Your verdict must be for plaintiff if you believe:

First, defendant sold *(describe substance)* for [human] [animal][1] consumption, and

Second, [plaintiff] [plaintiff's (describe animals such as "cows")][1] [ate] [drank][1] the *(describe the substance)*, and

Third, the *(describe substance)* when sold by defendant was not fit for [human] [animal][1] consumption, and

Fourth, as a direct result thereof plaintiff was damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1981 New)

1. Select the appropriate term or phrase.

* Add if affirmative defense is submitted.

Committee Comment (1996 Revision)

A. MAI 25.03 submits breach of implied warranty of fitness for a particular purpose of products in general under the Uniform Commercial Code. MAI 25.08 submits breach of implied warranty of merchantability (fitness for ordinary purposes) of products in general under the Uniform Commercial Code. The above instruction submits breach of common law implied warranty of fitness of food and drink for human or animal consumption. See §§ 400.1-103 and 400.2-314, RSMo, to determine the extent to which a common law action for implied warranty may be maintained.

B. In *Midwest Game Co., Inc. v. M.F.A. Milling Co.*, 320 S.W.2d 547, 550 (Mo. 1959), the court said: "It is an established rule that in a sale of food for immediate human consumption there is generally an implied warranty that the food is wholesome, is fit for the purpose, and is of merchantable quality. And a buyer of packaged food products may recover from the manufacturer upon an implied warranty of fitness even though there is no express privity of contract between the manufacturer and buyer."

C. See also, *Albers Milling Co. v. Carney*, 341 S.W.2d 117 (Mo. 1960).

D. Compare *Green v. Ralston Purina Co.*, 376 S.W.2d 119 (Mo. 1964), where plaintiff's evidence did not make a submissible case.

Research References

West's Key Number Digest
Products Liability ⚷420

Legal Encyclopedias
C.J.S., Products Liability § 282

Annotations

1. In general

Jury instruction in form of MAI 25.02 for farmer's products liability claim against feed producer for damages to cattle due to allegedly contaminated feed—requiring jury to find for farmer if it found that producer sold feed for animal consumption, that cattle ate feed, that feed when sold was not fit for animal consumption, and that, as direct result thereof, farmer was damaged—was not so vague as to give jury roving commission and, thus, was properly given, even though instruction did not specifically refer to aflatoxin, which allegedly caused the damage. *Sanders v. Hartville Milling Company*, 14 S.W.3d 188 (Mo.App. S.D. 2000).

25.03 [1980 Revision] Breach of Common Law Implied Warranty of Fitness for a Particular Purpose Under Uniform Commercial Code

Your verdict must be for plaintiff if you believe:

First, defendant sold[1] the *(describe the article or product)*, and

Second, defendant then knew or should have known of the use for which the *(describe the article or product)* was purchased, and

Third, plaintiff reasonably relied upon defendant's judgment that the *(describe the article or product)* was fit for such use, and

Fourth, when sold[1] by defendant, the *(describe the article or product)* was not fit for such use, and

Fifth, within a reasonable time after plaintiff knew or should have known the product was not fit for such use, plaintiff gave defendant notice thereof,[2] and

Sixth, as a direct result of *(describe the article or product)* being unfit for such use, plaintiff was damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 Revision)

1. In the event of a transaction other than a sale which gives rise to a warranty for a particular purpose, substitute the appropriate words.

2. If notice is not required, then omit paragraph Fifth. *See Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo.banc 1963); *Austin v. Western Auto Supply Co.*, 421 S.W.2d 203 (Mo. 1967); and discussion in *Crowder v. Vandendeale*, 564 S.W.2d 879 (Mo.banc 1978).

* Add if affirmative defense is submitted.

Committee Comment (1980 Revision)

A. This instruction is for use in a situation where there is an implied warranty of fitness for a particular purpose under the provisions of the Uniform Commercial Code enacted by the Missouri General Assembly originally in 1963. See § 400.2-315, RSMo, and the applicable comments which relate thereto for the requirements necessary to prove an implied warranty of fitness for a particular purpose.

B. It is well-settled law "that a manufacturer-seller of an article for a particular purpose impliedly warrants that such article will be reasonably fit for that purpose for which it is intended to be used, *if the buyer communicates to the manufacturer-seller the specific purpose for which he wants the article, and if he relies, and has reason to rely, on the producer-seller's skill, judgment and experience to produce an article that will answer the purpose." Southwest Distributors, Inc. v. Allied Paper Bag Corp.*, 384 S.W.2d 838, 841 (Mo.App. 1964).

C. "The statute requires that before there is an implied warranty the buyer must rely on the 'seller's skill or judgment to select or furnish suitable goods.' " *Plasco, Inc. v. Free-Flow Packaging Corp.*, 547 F.2d 86, 90 (8th Cir. 1977).

D. "Missouri law holds: [T]he mere fact of knowledge by the seller of the purpose for which the buyer desired the article is not sufficient to show a reliance by the buyer upon the skill, judgment and experience of the seller to raise an implied warranty of fitness . . .. Where the buyer understands what he wants and makes an independent examination of the product and tests the product in order to determine its fitness for the intended use, there can be no implied warranty of fitness for a particular purpose. Under the aforesaid circumstances the buyer does not rely on the seller's skill and judgment, but instead relies on his own judgment formed as a result of his examination and tests of the product." *Plasco,* at 91.

E. "Many cases hold that the manufacturer is liable as a warrantor of fitness for a special purpose though it did not appear that the goods sold were not fit for the purpose for which goods of the sort are naturally adapted." Williston on Contracts, Sale of Land and Personal Property § 989, at 559 (1957).

F. In an action brought under the provisions of the Uniform Commercial Code, § 400.2-607(3)(a), RSMo, provides "where a tender has been accepted the buyer must within a reasonable time after he discovers or should have discovered any breach notify the seller of breach or be barred from any remedy . . .." This notice provision may not be required in all causes of action.

G. A question that may not have been determined is whether there is still a common law cause of action for breach of express warranty. This code provides: "Unless displaced by the particular provisions of this chapter, the principles of law and equity . . . shall supplement its provisions." § 400.1-103, RSMo. Therefore, "traditional rights and remedies remain in force unless eliminated by a particular provision of the Uniform Commercial Code." *Roth v. Roth*, 571 S.W.2d 659, 671 (Mo.App. 1978).

H. For a Comment on the requirements of implied warranty of fitness, see 30 Mo.L.Rev. 275 (1965).

Research References

West's Key Number Digest
Products Liability ⚷420

Legal Encyclopedias
C.J.S., Products Liability § 282

Annotations

In general 1
Breach of contract 3
Converse instruction 2

1. In general

Where plaintiff submits on strict liability by modified MAI 25.03 it was error to give an instruction absolving defendant if defendant used ordinary care since this introduced the foreign issue of defendant's negligence. *Katz v. Slade*, 460 S.W.2d 608 (Mo. 1970).

Verdict director submitting liability for furnishing product not fit for intended use. *Plas-Chem Corp. v. Solmica, Inc.*, 434 S.W.2d 522 (Mo. 1968).

2. Converse instruction

Where plaintiff submitted "fitness" of auto jack for particular purpose, it was error to converse that with instruction exculpating the defendant if injury resulted from the "condition" of the jack. This, because MAI 29.01 [Now 33.01] requires the use of substantially the same language used in the verdict director. *Austin v. Western Auto Supply Co.*, 421 S.W.2d 203 (Mo. 1967).

3. Breach of contract

Where defendant agreed to build home according to plaintiffs' plans and specifications but defectively did so, plaintiffs' proper action was for breach of bilateral contract, not for implied warranty of fitness, and court erred in so submitting plaintiffs' case. *Barrett v. Jenkins*, 510 S.W.2d 805 (Mo.App. 1974).

25.04 [1978 Revision] Strict Liability—Product Defect

Your verdict must be for plaintiff if you believe:

First, defendant sold[1] the *(describe product)* in the course of defendant's business, and

Second, the *(describe product)* was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and

Third, the *(describe product)* was used in a manner reasonably anticipated, and

Fourth, plaintiff was damaged as a direct result of such defective condition as existed when the *(describe product)* was sold.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1991 Revision)

1. The term "sold" should be modified to cover other situations such as a commercial lease where strict liability is applicable.

* Add if affirmative defense is submitted. If § 537.765, RSMo is applicable, see Chapter 37.00 for submission of comparative fault. Do not use this bracketed phrase to submit comparative fault.

Committee Comment (1978 Revision)

A. This instruction is intended for use both in cases involving a manufacturing defect and in cases involving a design defect.

Research References

West's Key Number Digest
Products Liability ⚷423

Annotations

In general 1
"Unreasonably dangerous" 10
Comparative fault 8
Contributory fault 6

Conversing 5
Knowledge of defect 4
Modification—Retailer 7
Roving commission 9
Separate verdict directors 3
Strict tort liability 2

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1. In general

Modified MAI 25.04 proper in wrongful death action by user's widow against manufacturer only if it submits element that defective electric pump was being used in a reasonably anticipated manner. Court gives proper instruction. *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969).

If instruction was erroneous by failing to find that worker's damage was caused by defect which existed when chemical was sold by defendant, instruction did not prejudice defendant, where it was clear from both instruction and the evidence that if worker was injured due to chemical, it was caused by defect which existed when chemical was sold. *Ray v. Upjohn Co.*, 851 S.W.2d 646 (Mo.App. S.D. 1993).

MAI No. 25.04 is intended to be used in both manufacturing and in design defect cases. *Magnuson v. Kelsey-Hayes Co.*, 844 S.W.2d 448 (Mo.App. W.D. 1992).

In product liability cases, jury is not required to be instructed with definition of term "unreasonably dangerous." *Speck v. Abell-Howe Co.*, 839 S.W.2d 623 (Mo.App. W.D. 1992).

Appellate court approved modification of MAI 25.04 and 25.05 (strict liability) with MAI 19.01 (multiple causes of injury). *Menschik v. Mid-America Pipeline Co.*, 812 S.W.2d 861 (Mo.App. W.D. 1991).

Second collision case involving enhanced leg injuries to a motorcyclist as a result of a defective fairing following a motor vehicle collision. Indivisible injury rule applied to driver of motor vehicle and manufacturer of fairing in connection with leg injuries. Verdict directing instruction for "enhanced injury" cases approved. *McDowell v. Kawasaki Motors Corporation USA*, 799 S.W.2d 854 (Mo.App. W.D. 1990).

Not-in-MAI definition of the term "product" in MAI 25.04, as a "ladder-type track," held to be permissible. Modification of MAI 25.04 with MAI 19.01 held to be proper in stating that the product "directly caused or directly contributed to cause" decedent's death. *Eagleburger v. Emerson Electric Co.*, 794 S.W.2d 210 (Mo.App. S.D. 1990).

In appropriate cases, it is not error to give both MAI 25.04 and 25.05; although the alternative submissions must not be inconsistent with one another and there must be evidence to support each theory. No error where neither of the two theories required proof of a state of fact that would necessarily disprove a state of fact necessary to support the other. *Lewis v. Envirotech Corp.*, 674 S.W.2d 105 (Mo.App. E.D. 1984).

This instruction was intended for use both in cases involving a manufacturing defect and in cases involving a design defect, and there is no Missouri authority requiring definition of the terms "defective" and "unreasonably dangerous." *Jarrell v. Fort Worth Steel & Mfg. Co.*, 666 S.W.2d 828 (Mo.App. E.D. 1984).

Modified 25.04 in action against manufacturer concerning the defective armrest against which plaintiff driver was thrown when his car collided with another. *Cryts v. Ford Motor Co.*, 571 S.W.2d 683 (Mo.App. 1978).

Modified 31.01 (now withdrawn) properly based liability upon submission that car "had a fast idle cam that would break" and was dangerous: unnecessary to further submit detailed evidentiary facts. *Rinker v. Ford Motor Co.*, 567 S.W.2d 655 (Mo.App. 1978).

Verdict directors against manufacturer and retailer for defective handgun. *Bender v. Colt Industries*, 517 S.W.2d 705 (Mo.App. 1974).

2. Strict tort liability

Where plaintiff submits on strict liability by modified MAI 25.03 it was error to give an instruction absolving defendant if defendant used ordinary care since this introduced the foreign issue of defendant's negligence. *Katz v. Slade*, 460 S.W.2d 608 (Mo. 1970).

Verdict directors against manufacturer and retailer for defective handgun. *Bender v. Colt Industries*, 517 S.W.2d 705 (Mo.App. 1974).

3. Separate verdict directors

In products liability action against manufacturer and dealer plaintiff properly submitted separate verdict directors against each. *Williams v. Ford Motor Co.*, 494 S.W.2d 678 (Mo.App. 1973).

4. Knowledge of defect

Where plaintiff sued bailor of truck trailer for furnishing a dangerous instrumentality, his verdict director must submit the element of time—that bailor knew of the dangerous condition when he relinquished control. (See *Keener v. Dayton Elec. Co.*, 445 S.W.2d 362). *Whitney v. Central Paper Stock Co.*, 446 S.W.2d 415 (Mo.App. 1969).

5. Conversing

In conversing MAI 25.04 defendant entitled to converse "defective condition" of Paragraph Second without also conversing "and therefore dangerous, etc." *Lietz v. Snyder Mfg. Co.*, 475 S.W.2d 105 (Mo. 1972).

Although plaintiff's verdict director omitted the essential element that he was using the instrument when injured, defendant could properly submit that element in its converse instruction. *Mead v. Corbin Equipment, Inc.*, 586 S.W.2d 388 (Mo.App. W.D. 1979).

6. Contributory fault

Comparative fault does not apply in a strict products liability case, but the giving of MAI 32.23 is not precluded in the appropriate case. *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo.banc 1986).

Although defendant pleaded contributory fault it offered no such instruction, so plaintiff's verdict director properly omitted a "tail" on this affirmative defense. *Means v. Sears, Roebuck & Co.*, 550 S.W.2d 780 (Mo.banc 1977).

Action for *negligent* repair of furnace was not a strict liability case. Defendant was entitled to a proper contributory *negligence* instruction. *Portman v. Sinclair Oil Co.*, 518 S.W.2d 625 (Mo. 1975).

Unreasonable use of product with knowledge of defect is "contributory fault" and bars recovery. *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969).

Since negligence is not an element of a manufacturer's strict liability in tort, it is error to give a contributory negligence instruction. *Williams v. Ford Motor Co.*, 454 S.W.2d 611 (Mo.App. 1970).

7. Modification—Retailer

Plaintiffs' verdict director properly modified MAI 25.04 in action against *retailer*, the only MAI verdict-director being against a manufacturer. *Means v. Sears, Roebuck & Co.*, 550 S.W.2d 780 (Mo.banc 1977).

8. Comparative fault

Comparative fault does not apply in a strict products liability case, but the giving of MAI 32.23 is not precluded in the appropriate case. *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo.banc 1986).

A combine operator's contributory negligence was not a defense in a strict products liability case against a manufacturer, distributor and retailer. However, contributory fault, MAI 32.23, could be submitted as a complete defense. *Love v. Deere & Co.*, 720 S.W.2d 786 (Mo.App. W.D. 1986).

9. Roving commission

Term "dumbwaiter assembly," in instruction provided by repairman injured by falling dumbwaiter, and term "dumbwaiter system," in instruction submitted by seller and installer of dumbwaiter, did not cause jury confusion or give jury roving commission, since terms were defined similarly, and seller/installer neither offered definitional instruction that terms meant the same thing nor offered modified instruction incorporating term preference. *Lay v. P & G Health Care, Inc.*, 37 S.W.3d 310 (Mo.App. W.D. 2000).

10. "Unreasonably dangerous"

Even assuming Restatement's new risk-utility test was appropriate standard in defective design case, proffered supplemental instruction—defining "unreasonably dangerous" as meaning utility or usefulness outweighed by risks—did not provide any better guidance on test than MAI 25.04 given by trial court and, thus, was appropriately rejected by trial court, since proffered instruction did not address issue of reasonable alternative design raised by risk-utility test. *Newman v. Ford Motor Co.*, 975 S.W.2d 147 (Mo.banc 1998).

25.05 [1978 New] Strict Liability—Failure to Warn

Your verdict must be for plaintiff if you believe:

First, defendant sold the *(describe product)* in the course of defendant's business, and

Second, the *(describe product)* was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and

Third, defendant did not give an adequate warning of the danger, and

Fourth, the product was used in a manner reasonably anticipated, and

Fifth, plaintiff was damaged as a direct result of the *(describe product)* being sold without an adequate warning.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1991 Revision)

* Add if affirmative defense is submitted. If § 537.765, RSMo, is applicable, see Chapter 37.00 for submission of comparative fault. Do not use this bracketed phrase to submit comparative fault.

Research References

West's Key Number Digest
Products Liability ⚷427

Legal Encyclopedias
C.J.S., Products Liability § 285

Annotations

In general 1
Comparative fault 3
Contributory fault 2

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1. In general

Product user failed to prove element of causation in failure to warn product liability case and instruction on failure to warn should not have been submitted to jury; product user failed to show that a warning on air compressor instructing users that compressor created spark that could ignite flammable fumes would have altered product user's behavior as related to the accident where product user knew that there was danger of explosion if gas fumes accumulated in shop where accident occurred. *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192 (Mo.banc 1992).

Term "dumbwaiter assembly," in instruction provided by repairman injured by falling dumbwaiter, and term "dumbwaiter system," in instruction submitted by seller and installer of dumbwaiter, did not cause jury confusion or give jury roving commission, since terms were defined similarly, and seller/installer neither offered definitional instruction that terms meant the same thing nor offered modified instruction incorporating term preference. *Lay v. P & G Health Care, Inc.*, 37 S.W.3d 310 (Mo.App. W.D. 2000).

Appellate court approved modification of MAI 25.04 and 25.05 (strict liability) with MAI 19.01 (multiple causes of injury). *Menschik v. Mid-America Pipeline Co.*, 812 S.W.2d 861 (Mo.App. W.D. 1991).

In appropriate cases, it is not error to give both MAI 25.04 and 25.05; although the alternative submissions must not be inconsistent with one another and there must be evidence to support each theory. No error where neither of the two theories required proof of a state of fact that would necessarily disprove a state of fact necessary to support the other. *Lewis v. Envirotech Corp.*, 674 S.W.2d 105 (Mo.App. E.D. 1984).

2. Contributory fault

Comparative fault does not apply in a strict products liability case, but the giving of MAI 32.23 is not precluded in the appropriate case. *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo.banc 1986).

3. Comparative fault

Comparative fault does not apply in a strict products liability case, but the giving of MAI 32.23 is not precluded in the appropriate case. *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo.banc 1986).

25.06 [1990 Withdrawn] Products Liability—Negligently Furnishing Dangerous Instrumentality or Product

Historical Note

(This instruction and the Notes on Use thereto are withdrawn. See MAI 25.09, 25.10(A) and 25.10(B)).

25.07 [1991 Revision] Breach of Express Warranty Under Uniform Commercial Code

Your verdict must be for plaintiff if you believe:

First, defendant sold[1] and plaintiff[2] purchased[1] *(here describe the article or product)*, and

Second, defendant represented [by *(here insert conduct claimed to have constituted a representation)*][3] that *(here insert the representation claimed to be an express warranty under § 400.2-313, RSMo)*, and

Third, such representation [was made to induce plaintiff to purchase][1] [or] [was a material factor in plaintiff's decision to purchase][1] the *(describe the article or product)*,[4] and

Fourth, the *(describe the article or product)* did not conform to such representation made by defendant, and

Fifth, within a reasonable time after plaintiff knew or should have known of such failure to conform, plaintiff gave defendant notice thereof, and

Sixth, as a direct result of such failure to conform, plaintiff was damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1991 Revision)

1. In the event of a transaction other than a sale as to which there is an express warranty, substitute the appropriate words.

2. If the injured party was not the purchaser of the goods but is a natural person who is a member of the family or household of the buyer or was a guest in the buyer's home and it was reasonable to expect that such person would use, consume, or be affected by the goods, the instruction should be modified as follows:

(a) In paragraph First change "plaintiff" to the name of the buyer.

(b) Insert the following paragraphs as paragraph Second and Third and renumber the remaining paragraphs:

Second, plaintiff [was a member of *(name of purchaser)*'s family] [was a member of *(name of purchaser)*'s household] [was a guest in *(name of purchaser)*'s home], and

Third, defendant should have reasonably expected that such a person would [use] [consume] [be affected by] *(describe the article or product)*, and

See § 400.2-318, RSMo.

3. Insert bracketed phrase when the representation is based on conduct other than an express statement of the alleged representation.

4. Plaintiff may select either or both phrases. If both are used, submit in the disjunctive and the evidence must support each.

* Add if affirmative defense is submitted.

Committee Comment (1991 Revision)

A. This instruction is for use in an express warranty case in which the Uniform Commercial Code enacted by the Missouri General Assembly in 1963 is applicable. See § 400.2-313, RSMo, and the applicable comments which relate thereto for the requirements necessary to prove an express warranty. For a discussion of the requirements of express warranty in Missouri, also see *Interco Inc. v. Randustrial Corp.*, 533 S.W.2d 257 (Mo.App. 1976). Although no particular reliance on an express warranty is necessary, the UCC requires that it be part of the "basis of the bargain." *Interco,* at 262. Express warranties are more than expressions of opinion and are properly regarded as expressions of fact. "Ordinarily . . . the question of whether there has been a breach of warranty is a factual matter to be determined by the trier of fact." *Interco,* at 263.

B. Regarding the requirement of notice, see § 400.2-607(3)(a), RSMo.

C. Section 400.2-725(1), RSMo, requires that actions for breach of a sale contract be brought within four years after the cause of action has accrued.

D. By express disclaimer, warranties may be limited or eliminated and the parties may reduce the period of limitations but not extend it. However, the court may refuse to enforce any contract term which is unconscionable. See §§ 400.2-316 and 400.2-302, RSMo.

Research References

West's Key Number Digest
Products Liability ⚿420

Annotations

In general 1
Evidentiary support 2

1. In general

Verdict director that tracked the language of MAI 25.07 without modification was not prejudicially vague, ambiguous, or erroneous; there is no requirement to instruct the jury that it find that the alleged representations or warranties were false when made. *Carpenter v. Chrysler Corporation*, 853 S.W.2d 346 (Mo.App. E.D. 1993).

2. Evidentiary support

Automobile purchasers made submissible case on their claim for breach of express warranty and common law fraud where purchasers sufficiently established that statements of car dealer's salesman falsely described a car's condition, that car dealer did not disclose to purchasers certain repairs made to the car prior to its sale, that the statements were representations of fact and not mere puffing, that the misrepresentations were material, and that the purchasers reasonably relied upon them. *Carpenter v. Chrysler Corporation*, 853 S.W.2d 346 (Mo.App. E.D. 1993).

25.08 [1980 New] Breach of Implied Warranty of Merchantability Under Uniform Commercial Code

Your verdict must be for plaintiff if you believe:

First, defendant sold[1] and plaintiff[2] purchased[1] *(describe the article or product)*, and

Second, when sold by defendant *(describe the article or product)* was not fit for one of its ordinary purposes,[3] and

Third, plaintiff used such *(describe the article or product)* for such a purpose, and[4]

Fourth, within a reasonable time after plaintiff knew or should have known the product was not fit for such purpose, plaintiff gave defendant notice thereof, and

Fifth, as a direct result of such *(describe the article or product)* being unfit for such purpose, plaintiff was damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1991 Revision)

1. In the event of a transaction other than a sale which gives rise to an implied warranty of merchantability, substitute the appropriate words.

2. If the injured party was not the purchaser of the goods but is a natural person who is a member of the family or household of the buyer or was a guest in the buyer's home and it was reasonable to expect that such person would use, consume, or be affected by the goods, the instruction should be modified as follows:

(a) In paragraph First change "plaintiff" to the name of the buyer.

(b) Insert the following paragraphs as paragraph Second and Third and renumber the remaining paragraphs:

Second, plaintiff [was a member of *(name of purchaser)*'s family] [was a member of *(name of purchaser)*'s household] [was a guest in *(name of purchaser)*'s home], and

Third, defendant should have reasonably expected that such a person would [use] [consume] [be affected by] *(describe the article or product)*, and

See § 400.2-318, RSMo.

3. Although the most common claim for breach of the implied warranty of merchantability is that the article was not fit for the ordinary purposes for which such goods are used, the Uniform Commercial Code, § 400.2-314, RSMo, provides five other requirements for goods to be merchantable. In the event the breach proved is one other than fitness for the ordinary purposes, paragraphs Third and Fourth must be modified to state the statutory basis of the breach proved, which are stated in § 400.2-314(2)(a), (b), (d), (e), or (f), RSMo.

4. Omit this paragraph and renumber the remaining paragraphs if plaintiff learns that the goods are unfit by means other than use, such as by an initial inspection.

Submit the following as paragraph Second and renumber the remaining paragraphs if the issue of whether the defendant is a merchant is an appropriate issue in the case:

Second, defendant was a merchant with respect to such *(describe the article or product),* and

* Add if affirmative defense is submitted.

Committee Comment (1991 Revision)

A. This instruction is for use in an implied warranty case in which the Uniform Commercial Code enacted by the Missouri General Assembly in 1963 is applicable. See § 400.2-314, RSMo, and the applicable comments which relate thereto for the requirements necessary to prove an implied warranty.

B. Since the decision of *Morrow v. Caloric Appliance Corp.*, 372 S.W.2d 41 (Mo.banc 1963), a consumer may recover for breach of implied warranty against the manufacturer despite lack of privity.

C. "The *Uniform Commercial Code* does not attempt any definitive resolution of the privity of contract problem, but leaves the matter to the decidedly non-uniform development of the common law in the various states. The UCC restricts its treatment of the subject to a relatively small area. Section 400.2-318 provides that warranties by a seller extend not only to the buyer, but also to members of the buyer's household and guests therein 'if it is reasonable to expect that such person may use, consume or be affected by the goods.' This extension includes only those 'injured in person' by the breach." 30 Mo.L.Rev. 259, 279–80 (1965).

Research References

West's Key Number Digest
Products Liability ⚷420

Annotations

In general 1
Affirmative defense 3
Modification 2

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1. In general

Verdict-directing instruction for breach of implied warranty did not have to contain definitional instructions on terms "used" and "fit for one of its ordinary purposes." *Christensen v. R.D. Sell Const. Co.*, 774 S.W.2d 535 (Mo.App. W.D. 1989).

2. Modification

In homeowner's suit against builder, breach of implied warranty that house was suitable for ordinary purposes was properly submitted under MAI 25.08. *Lieber v. Bridges*, 650 S.W.2d 688 (Mo.App. S.D. 1983).

3. Affirmative defense

Where an affirmative defense has evidentiary support and is therefore properly included, the failure to include in the verdict-director the phrase "unless you believe plaintiff is not entitled to recover by reason of Instruction No. ______," more commonly referred to as a "tail," is reversible error. *Lieber v. Bridges*, 650 S.W.2d 688 (Mo.App. S.D. 1983).

25.09 [1990 New] Product Liability—Negligent Manufacture, Design, or Failure to Warn

Your verdict must be for plaintiff if you believe[1]:

First, defendant [manufactured] [designed][2] the *(describe product)*, and

Second, the *(describe product) (here describe alleged defect or hazard)*, and

Third, defendant failed to use ordinary care[3] to [either] [[manufacture] [design][2] the *(describe product)* to be reasonably safe] [[or] adequately warn of the risk of harm from *(here describe alleged defect or hazard)*],[4] and

Fourth, as a direct result of such failure, [in one or more of the respects submitted in paragraph Third,][4] plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number _______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1990 New)

1. Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01.

2. Select appropriate term.

3. The phrase "ordinary care" must be defined. See definition at MAI 11.05. MAI 11.10 II may be appropriate in some situations.

4. Select one or both phrases. If both phrases are used, they must be submitted in the disjunctive and each must be supported by the evidence.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (2021 Revision)

A. This instruction is for submission of a negligence theory of product liability. See § 395, Restatement of Torts (Second) (1965) which was referenced in *Stevens v. Durbin-Durco, Inc.*, 377 S.W.2d 343, 346 (Mo. 1964); §§ 388 and 392, Restatement of Torts (Second) (1965) were approved in *Morris v. Shell Oil Company*, 467 S.W.2d 39, 42 (Mo. 1971); and *Ridenhour v. Colson Caster Corp.*, 687 S.W.2d 938, 945 (Mo.App. S.D. 1985), respectively. See MAI 25.10(A) and 25.10(B). Each Restatement section has different substantive elements.

B. Where suit involves multiple causes of damage, see MAI 19.01.

Research References

West's Key Number Digest
Products Liability ⚷425 to 427

25.10(A) [1990 New] Negligently Supplying Dangerous Instrumentality

Your verdict must be for plaintiff if you believe[1]:

First, defendant supplied *(here describe instrumentality supplied, such as automobile, hair dye, etc.)* for use, and

Second, the *(describe instrumentality) (here describe defect or hazard such as "had a wheel constructed with improperly tempered steel which had a propensity to break"; "included an ingredient which would cause systemic damage in certain persons", etc.)* and was therefore dangerous when put to a reasonably expected use, and

Third, the *(describe instrumentality)* was put to a reasonably expected use, and

Fourth, defendant had no reason to believe that those for whose use the *(describe instrumentality)* was supplied would realize its dangerous condition, and

Fifth, defendant knew or had information from which defendant, in the exercise of ordinary care,[2] should have known of such dangerous condition, and

Sixth, defendant failed to adequately warn of such dangerous condition, and

Seventh, defendant was thereby negligent,[3] and

Eighth, as a direct result of such negligence,[3] plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1990 New)

1. Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01.

2. The phrase "ordinary care" must be defined. See definition at MAI 11.05.

3. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (2021 Revision)

A. Sections 388 and 392, Restatement (Second) of Torts (1965) were approved in *Morris v. Shell Oil Company*, 467 S.W.2d 39, 42 (Mo. 1971), and *Ridenhour v. Colson Caster Corp.*, 687 S.W.2d 938, 945 (Mo.App. S.D. 1985), respectively. Each Restatement section has different substantive elements. This instruction is for submission under § 388. See MAI 25.10(B) for submission under § 392.

B. Section 388 of the Restatement uses the terms "dangerous for the use for which it is supplied." Comment "e" of the Restatement explains the term "use" by the language " . . . but the chattel must be put to a use to which the supplier has reason to expect it to be put."

C. Paragraph Fifth uses the phrase "had information from which defendant, in the exercise of ordinary care, should have known" as the equivalent of the phrase "had reason to know" as defined in Restatement (First) and (Second) of Torts § 12. The Committee has opted to use this equivalent phrase rather than "had reason to know" because it is thought that the phrase "had reason to know" may be confusing or misleading to the jury.

D. Where suit involves multiple causes of damage, see MAI 19.01.

Research References

West's Key Number Digest
Products Liability ⚷423

Annotations

1. In general

MAI 25.10A, on supplying of dangerous instrumentality, does not apply to gratuitous bailments. *Bailey v. Innovative Management & Inv., Inc.*, 916 S.W.2d 805 (Mo.App. W.D. 1995).

In action by electricity customer against supplier to recover for injuries received while attempting to install transformer fuse, instruction was improper where it failed to require the jury to find that furnishing the fuse to customer presented a foreseeable risk of injury and that supplier knew or in the exercise of the highest degree of care should have known of the risk and failed to warn of it; modifications of MAI 25.10(A) would appear to be appropriate to this case. *Mobley v. Webster Elec. Co-op.*, 859 S.W.2d 923 (Mo.App. S.D. 1993).

Transformer fuse was not dangerous, and thus customer who was injured while installing it could not recover on theory of negligently furnishing dangerous instrumentality. *Mobley v. Webster Elec. Co-op.*, 859 S.W.2d 923 (Mo.App. S.D. 1993).

Restatement (Second) of Torts § 392 provides a cognizant legal theory of recovery for negligent failure to warn. The elements under § 392 are: (1) a supplier who supplies; (2) a chattel for supplier's business purposes; (3) the chattel is used in the manner for which and by persons for whose use it was supplied; (4) the chattel was defective, the defect was discoverable on inspection, and the defect caused the accident; and (5) the supplier failed to inspect and failed to inform of the defect. Plaintiff's proposed instruction did not set forth all of these necessary elements and was properly refused. *Steenrod v. Klipsch Hauling Co.*, 789 S.W.2d 158, 168 (Mo.App. E.D. 1990).

25.10(B) [1995 Revision] Negligently Supplying Dangerous Instrumentality for Supplier's Business Purposes

Your verdict must be for plaintiff if you believe[1]:

First, defendant supplied *(here describe instrumentality supplied, such as automobile, hair dye, etc.)* for use, and

Second, the *(describe instrumentality) (here describe defect or hazard such as "had a wheel constructed, with improperly tempered steel that had a propensity to break"; "included an ingredient that would cause systemic damage in certain persons", etc.)* and was therefore dangerous when put to a reasonably expected use, and

Third, the *(describe instrumentality)* was put to a reasonably expected use, and

Fourth, defendant knew or in the exercise of ordinary care[2] could have known of such dangerous condition, and

Fifth, defendant failed to exercise ordinary care[2] to [either] [make the condition reasonably safe] [or adequately warn of it][3], and

Sixth, as a direct result of such failure, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number affirmative defense instruction)*].

Notes on Use (1990 New)

1. Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01.

2. The phrase "ordinary care" must be defined. See definition at MAI 11.05.

3. Select one or both phrases. If both phrases are used, they must be submitted in the disjunctive and each must be supported by the evidence.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (2021 Revision)

A. Sections 388 and 392, Restatement (Second) of Torts (1965) were approved in *Morris v. Shell Oil Company*, 467 S.W.2d 39, 42 (Mo. 1971), and *Ridenhour v. Colson Caster Corp.*, 687 S.W.2d 938, 945 (Mo.App. S.D. 1985), respectively. Each Restatement section has different substantive elements. This instruction is for submission under § 392. See MAI 25.10(A) for submission under § 388.

B. Section 388 of the Restatement uses the terms "dangerous for the use for which it is supplied." Comment "e" of the Restatement explains the term "use" by the language ". . . but the chattel must be put to a use to which the supplier has reason to expect it to be put". Comment "a" to § 392 of the Restatement incorporates by reference the rationale expressed in the comments to § 388.

C. The 1995 Revision to this instruction changed the phrase "should have known" to "could have known" on the issue of constructive notice. Some MAI instructions had used one of the phrases and other instructions had used the other phrase. Questions had arisen as to whether "should have known" imposed a higher burden than "could have known". See *Benton v. City of Rolla*, 872 S.W.2d 882 (Mo.App. S.D. 1994), and *Burrell v. Mayfair-Lennox Hotels, Inc.*, 442 S.W.2d 47 (Mo. 1969). For consistency, the Committee has opted to use the phrase "could have known" to the extent possible in the context of constructive notice. Other instructions, such as MAI 10.07, paragraph Second of MAI 22.01, MAI 22.07, and MAI 25.10(A), continue to use the phrase "should have known" because that phrase is part of a "knew or had reason to know" standard as explained in the Committee Comments to those instructions.

D. Where suit involves multiple causes of damage, see MAI 19.01.

Research References

West's Key Number Digest
Products Liability 🔑423

Annotations

1. In general

Ankle bracelet for monitoring parolee, which device had previously sent false alarms, was not dangerous instrumentality, for purposes of negligence suit brought against monitoring corporation by widow and son of man killed in automobile accident involving intoxicated parolee, where device was not defective, and false alarms were corrected by placing the receiver in another location within the house. *Trout v. General Sec.*

Services Corp., 8 S.W.3d 126 (Mo.App. S.D. 1999).

Error in dismissing claims against city was harmless, where verdict directions instruction under MAI 31.16 given on remaining claim was practically identical to instructions under MAI 22.05 and 25.10(B) from which plaintiff would have been required to choose if other claims had not been dismissed and jury returned verdict in city's favor; under circumstances, dismissal of those claims did not affect out-come of case. *Benton v. City of Rolla*, 872 S.W.2d 882 (Mo.App. S.D. 1994).

Transformer fuse was not dangerous, and thus customer who was injured while attempting to install it could not recover on theory of negligently furnishing dangerous instrumentality. *Mobley v. Webster Elec. Co-op.*, 859 S.W.2d 923 (Mo.App. S.D. 1993).

26.00

VERDICT DIRECTING—CONTRACT

26.01 Breach of Unilateral Contract
26.02 Breach of Bilateral Contract—Breach Sole Issue
26.03 Action on Account
26.04 Account Stated—Matured Debts
26.05 Quantum Meruit—Goods or Services Furnished
26.06 Breach of Bilateral Contract—Terms and Breach in Issue
26.07 Breach of Bilateral Contract—When Substantial Performance Sufficient

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Research References

West's Key Number Digest
Contracts 🔑353(1), 353(8), 353(10)

A.L.R. Library
A.L.R. Index, Breach of Contract; Quantum Meruit
West's A.L.R. Digest, Contracts 🔑353(1), 353(8), 353(10)

Legal Encyclopedias
C.J.S., Contracts §§ 1065, 1066

26.01 [1980 Revision] Breach of Unilateral Contract

Your verdict must be for plaintiff if you believe:

First, defendant offered to *(set out essential terms of offer)* if plaintiff would *(set out terms of plaintiff's performance)*, and

Second, plaintiff performed the act[s] called for in such offer with intent to accept such offer, and

Third, defendant knew of such performance, and

Fourth, defendant thereafter did not perform in accord with such offer, and

Fifth, plaintiff was thereby damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 Revision)

* Add if affirmative defense is submitted.

Research References

West's Key Number Digest
Contracts ⚷353(8)

Annotations

In general 1
Consideration 4
Definition 3
Evidentiary support 2

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1. In general

Non-MAI Instruction on contractual duty of good faith and fair dealing approved. *Rock Port Market v. Affiliated Foods*, 532 S.W.3d 180 (Mo.App. W.D. 2017).

Where terms of agreement are in dispute, verdict-directing instruction must hypothesize proponent's version of agreement actually made, and failure to do so is prejudicial error. *Cranor v. Jones Co.*, 921 S.W.2d 76 (Mo.App. E.D. 1996).

Jury instruction regarding diminished fair market property value, due to the builder's failure to grade the property pursuant to a contract, was not misleading or confusing to the jury, nor was the ability of the jury to grant damages for "loss of use" without defining that term. *Kaiser v. Kadean Const. Co.*, 719 S.W.2d 892 (Mo.App. E.D. 1986).

Breach of contract verdict director submitting only "defendant's contract obligations were not met" erroneous for failure to state the nature of the breach. *Tainter v. Graham*, 579 S.W.2d 143 (Mo.App. E.D. 1979).

Plaintiffs' not-in-MAI verdict director for breach of house building contract, patterned after MAI 26.01, arguably erroneous when terms of contract were in dispute. Defendants' contention that some form of MAI 26.06 should have been used failed for not informing court how that could have been done without transgressing Rule 70.02(a). *Forsythe v. Starnes*, 554 S.W.2d 100 (Mo.App. 1977).

Verdict director on bilateral contract of employment. *Vondras v. Titanium Research & Development Co.*, 511 S.W.2d 883, 885 (Mo.App. 1974).

Verdict director for damage by surface water. *Genova v. Kansas City*, 497 S.W.2d 555 (Mo.App. 1973).

Where plaintiff's case for breach of contract was based on three elements it was error to omit the connective "and" between paragraphs of plaintiff's Not-in-MAI verdict director. *R-Way Furniture Co. v. Powers Interiors, Inc.*, 456 S.W.2d 632 (Mo.App. 1970).

2. Evidentiary support

Paragraph First of MAI 26.01, Breach of Unilateral Contract, had evidentiary support if defendant's proposal could be reasonably inferred from the testimony. *James v. Turilli*, 473 S.W.2d 757 (Mo.App. 1971).

3. Definition

Accurate definition of "substantially performed," which is a legal and technical term. *Forsythe v. Starnes*, 554 S.W.2d 100 (Mo.App. 1977).

4. Consideration

MAI 26.01 properly instructed jury that it had to find performance with intent to accept offer; separate finding of consideration was not necessary. *Cook v. Coldwell Banker/Frank Laiben Realty Co.*, 967 S.W.2d 654 (Mo.App. E.D. 1998).

26.02 [1980 Revision] Breach of Bilateral Contract—Breach Sole Issue

Your verdict must be for plaintiff if you believe:

First, defendant did not *(here insert the nature of the breach)*, and

Second, because of such failure, defendant's contract obligations were not performed, and

Third, plaintiff was thereby damaged.

* [unless you believe that plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 Revision)

This instruction is applicable only when there is no dispute concerning the terms of the agreement and the defendant's obligation to perform his agreement.

* Add if affirmative defense is submitted.

Research References

West's Key Number Digest
Contracts 🔑353(8)

Annotations

In general 1
Affirmative defense 3
Contract terms disputed 2
Contract to loan money 6
Damages 4
Definition 7
Modification 8
Modified; sales contract 5

1. In general

MAI 26.02 is to be used where the existence and terms of a contract are undisputed and the sole issue is whether defendant breached the contract. *Laclede Investment Corp. v. Kaiser*, 541 S.W.2d 330 (Mo.App. 1976).

Approved not-in-MAI verdict director based on bilateral contract hypothesizing offer, acceptance and breach. *Hinkeldey v. Cities Service Oil Co.*, 470 S.W.2d 494, 496 (Mo. 1971).

In suit on an oral promise asserted by plaintiff and denied by defendant it was sufficient to submit a not-in-MAI verdict director hypothesizing the ultimate issue "the defendant agreed to pay cash . . . for said property" and failed to do so to plaintiff's damage.

Verdict director approved. *Gottlieb v. Hyken*, 448 S.W.2d 617 (Mo. 1970).

MAI 26.02 is the proper instruction where the existence and terms of the contract are undisputed and a party disputes whether the contract should be enforced due to fraud or misrepresentation. *Oliver v. Ford Motor Credit Co., LLC*, 437 S.W.3d 352 (Mo.App. W.D. 2014).

Building owner's submission of instruction patterned after approved instruction concerning breach of undisputed contract terms, rather than based on approved instruction concerning dispute over contract terms and breach of contract, resulted in prejudicial error. *Porta-Fab Corp. v. Young Sales Corp.*, 943 S.W.2d 686 (Mo.App. E.D. 1997).

In customer's breach of contract action against bank, trial court properly used as verdict-directing instruction approved instruction to be used for breach of bilateral contract action where breach is sole issue, rather than approved instruction to be used in breach of contract action when terms of agreement and its breach are at issue; although terms of agreement between bank and customer were disputed, that dispute was not determinative of the issues as submitted by the parties. *McMillan v. First State Bank of Joplin*, 935 S.W.2d 329 (Mo.App. S.D. 1996).

MAI 26.06 was not proper instruction where plaintiff was prevented from performing contract by defendants; MAI 26.06 only addresses a situation where plaintiff fully performed; giving of instruction modified after MAI 26.02 was not reversible error. *Smith Moore & Co. v. J.L. Mason Realty & Inv., Inc.*, 817 S.W.2d 530 (Mo.App. E.D. 1991).

A verdict director instruction patterned after MAI 26.02 for breach of contract will be proper if it accurately describes the nature of the breach. *George K. Baum Properties, Inc. v. Columbian Nat. Title Ins. Co.*, 763 S.W.2d 194, 200, 202 (Mo.App. W.D. 1988).

Any error in verdict director omitting element that policy was in force was cured by reference to instruction on affirmative defense of misrepresentation. *Crewse v. Shelter Mut. Ins. Co.*, 706 S.W.2d 35 (Mo.App. W.D. 1985).

In breach-of-contract action, absence from defendant's verdict director on counterclaim of essential element of excused delay in performance was cured by fact that the contested element of excusable delay was necessarily addressed by the jury in finding against plaintiff on its claim under plaintiff's verdict director as conversed by defendant's instruction defining that term. *Seuf, Inc. v. Bartlett*, 665 S.W.2d 31 (Mo.App. W.D. 1984).

MAI 26.02 is intended to be used in situations where the existence and terms of the contract are undisputed and the jury is to decide only the issues of breach and resulting damages. *Buder v. Martin*, 657 S.W.2d 667 (Mo.App. E.D. 1983).

Where interpretation of contract terms were in dispute, submission of instruction patterned after MAI 26.02 was prejudicial error. *Reed Stenhouse, Inc. of Missouri v. Portnoy*, 642 S.W.2d 947 (Mo.App. E.D. 1982).

Failure to submit disputed and essential element of substantial performance constituted an impermissible deviation from MAI 26.02. *Reed Stenhouse, Inc. of Missouri v. Portnoy*, 642 S.W.2d 947 (Mo.App. E.D. 1982).

MAI 26.02 covers cases where the only issues are breach and resultant damage; where the issues are what agreement was made and if breached, MAI 26.06 is the proper instruction. *Braun v. Lorenz*, 585 S.W.2d 102 (Mo.App. W.D. 1979).

MAI 26.02 is designed for cases where terms of contract are undisputed. *North County School Dist. R-1 v. Fidelity & Deposit Co.*, 539 S.W.2d 469 (Mo.App. 1976).

Where defendant agreed to build home according to plaintiffs' plans and specifications but defectively did so, plaintiffs' proper action was for breach of bilateral contract, not for implied warranty of fitness, and court erred in so submitting plaintiffs' case. *Barrett v. Jenkins*, 510 S.W.2d 805 (Mo.App. 1974).

In suit on express contract for agreed price for building a garage the court properly submitted plaintiff "substantially performed" the contract. Defendant was entitled to converse that specific element but was not entitled to base a converse on three separately described construction defects. *Bullock Co. v. Allen*, 493 S.W.2d 5 (Mo.App. 1973).

Where plaintiff's case for breach of contract was based on three elements it was error to omit the connective "and" between paragraphs of plaintiff's Not-in-MAI verdict director. *R-Way Furniture Co. v. Powers Interiors, Inc.*, 456 S.W.2d 632 (Mo.App. 1970).

Where plaintiffs granted powerline easement for defendant's promise to pay stated amount for each pole installed it was error to give plaintiffs' not-in-MAI instructions authorizing recovery for difference between before and after values, since plaintiffs' recovery was limited to breach of defendant's promise to pay agreed amount. *Shelton v. M & A Elec. Power Co-op.*, 451 S.W.2d 375 (Mo.App. 1970).

In suit against repairman where elements of reasonable time and damages were the only issues, a not-in-MAI verdict director which included undisputed evidentiary facts violated Rule 70.01(e) concerning submission of only the disputed, ultimate facts. *Pavyer Printing Mach. Works v. South Side Roofing Co.*, 446 S.W.2d 445 (Mo.App. 1969).

In suit on implied contract, verdict director should not have required the jury to find the existence of an "implied contract", that being a legal question, but should have merely hypothesized the ultimate fact of the parties' agreement. *Kosher Zion Sausage Co. of Chicago v. Roodman's, Inc.*, 442 S.W.2d 543 (Mo.App. 1969).

2. Contract terms disputed

Where terms of contract were disputed it was error to give MAI 26.02 submitting only defendant's breach. *Varn Co. v. Hamiltonian Fed. Sav. & Loan Ass'n*, 488 S.W.2d 649 (Mo. 1973).

MAI 26.02 did not have to hypothesize terms of agreement with regard to self-insured employer's breach-of-contract claim against insurance brokers to obtain stop-loss medical policy with active-at-work provision; brokers admitted material terms of contract. *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386 (Mo.App. E.D. 1998).

It was prejudicial error to give verdict directing instruction based on MAI 26.02 in contract dispute over corporation's payment of additional funds into travel agent's escrow account where parties disputed whether contract required corporation to pay second deposit into account if there were enough funds to recover cost of actual number of trips in corporation's incentive travel program; MAI 26.02 is intended for use in situations where existence and terms of contract are undisputed and the sole question for jury to decide is whether defendant has breached that contract and, if so, the damage resulting; MAI 26.06 is to be used where the terms of the agreement and its breach are at issue. *James O'Brien & Associates, Inc. v. American Sportsman Travel, Inc.*, 819 S.W.2d 62 (Mo.App. E.D. 1991).

Breach of contract verdict director submitting only "defendant's contract obligations were not met" erroneous for failure to state the nature of the breach. *Tainter v. Graham*, 579 S.W.2d 143 (Mo.App. E.D. 1979).

3. Affirmative defense

Where defendant got an affirmative defense instruction submitting facts justifying his termination of a contract the instruction should also have submitted that defendant did in fact terminate the contract. *Beuc v. Morrissey*, 463 S.W.2d 851 (Mo.banc 1971).

Defendant's theory that unreasonable working conditions justified her in breaching employment contract was properly submitted by a Third-Method Converse. *State ex rel. State Department of Public Health and Welfare, Division of Welfare v. Luster*, 456 S.W.2d 600 (Mo.App. 1970).

4. Damages

Plaintiff's verdict director on breach of contract must submit the fact that plaintiff was damaged by the breach. *Beuc v. Morrissey*, 463 S.W.2d 851 (Mo.banc 1971).

5. Modified; sales contract

Where action on a construction contract was based on failure to construct roof in a workmanlike manner, MAI 26.02 improperly omitted that element and erroneously conditioned plaintiff's recovery on whether the roof leaked. *North County School Dist. R-1 v. Fidelity & Deposit Co.*, 539 S.W.2d 469 (Mo.App. 1976).

Seller's verdict director against defaulting buyer. *R.R. Waites Co. v. E.H. Thrift Air Conditioning, Inc.*, 510 S.W.2d 759 (Mo.App. 1974).

6. Contract to loan money

Verdict director on breach of contract to loan money. *Levey v. Roosevelt Fed. Sav. & Loan Ass'n*, 504 S.W.2d 241 (Mo.App. 1973).

7. Definition

Accurate definition of "substantially performed," which is a legal and technical term. *Forsythe v. Starnes*, 554 S.W.2d 100 (Mo.App. 1977).

8. Modification

Because of unique factual issues created by lease addendum releasing tenant of duty to restore premises to their original condition, but preserving tenant's liability for "remediation of any environmental issues," trial court properly modified MAI 26.02, relating to landlord's breach of contract claim, to include additional requirement that landlord could prevail only if jury found that alleged oil deposits left by tenant constituted "environmental issue." *Shutt v. Chris Kaye Plastics Corp.*, 962 S.W.2d 887 (Mo.banc 1998).

Where contract terms are not in dispute, the second paragraph of MAI 26.02 should not be modified to explain the specific contractual obligation; where contract terms are in dispute, MAI 26.06 is the proper instruction. *Travelers Commercial Casualty Company v. Vac-It-All Servs., Inc.*, 451 S.W.3d 301 (Mo.App. E.D. 2014).

Modified MAI 26.02 could be submitted with applicable Illinois substantive law so long as instruction did not contain abstract statements of law. *Shop 'N Save Warehouse Foods, Inc. v. Soffer*, 918 S.W.2d 851 (Mo.App. E.D. 1996).

No approved instruction covers an action for breach of warranty for workmanlike performance and, therefore, a non-MAI or modified instruction is required under Rule 70.02(e). The court approved the use of a modification of MAI 26.02. *Crank v. Firestone Tire & Rubber Co.*, 692 S.W.2d 397 (Mo.App. W.D. 1985).

Words in instructions which are in common usage and are generally understood need not be defined. Court noted frequent instructional use of "workmanlike manner" without definition. *Steffens v. Paramount Properties, Inc.*, 667 S.W.2d 725 (Mo.App. E.D. 1984).

26.03 [1969 New] Action on Account

Your verdict must be for plaintiff if you believe:

First, at defendant's request, plaintiff furnished [to defendant] [to *(name of third party)*][1] certain *(describe goods furnished)* between ________, ____ *(state date)* and ________, ____*(state date)*, and

Second, plaintiff charged a total of $________ for such goods, and

Third, plaintiff's charges were reasonable.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction including defense of payment)*].

Notes on Use (1969 New)

1. Select appropriate term.

* Add if affirmative defense is submitted.

Research References

West's Key Number Digest
Contracts ⚷353(1)

Annotations

In general 1
Evidentiary support 3
Measure of damages 2

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1. In general

Verdict-directing pattern instruction for action on account was properly given in excavator's action to recover payment against property owners who allegedly hired excavator to conduct lake excavation project, rather than instruction relating to breach of contract, although it was not clear whether parties had ever reached agreement as to project, as action on account was pled, and facts existed to support that claim. *Raysik v. Standiford*, 944 S.W.2d 288 (Mo.App. W.D. 1997).

Trial court should have given instruction for quantum meruit, not for action on account, in attorney's action to recover attorney fees, where no express contract existed between attorney and client. *Kalish v. Smith*, 824 S.W.2d 35 (Mo.App. E.D. 1991).

An action on a "time plus materials" contract possess all of the classic indices of an action on an account for which MAI 26.03 was specifically drafted. *Wehrend v. Roknick*, 664 S.W.2d 247 (Mo.App. E.D. 1983).

2. Measure of damages

In home builder's action for balance of price of house, MAI 4.04 was proper damage instruction with MAI 26.03. *Wehrend v. Roknick*, 664 S.W.2d 247 (Mo.App. E.D. 1983).

Where plaintiff submitted on MAI 26.03—Action on Account, its proper damage instruction was MAI 4.04. *Hereford Concrete Products v. Aerobic Services*, 565 S.W.2d 176 (Mo.App. 1978).

3. Evidentiary support

Evidence including testimony of plaintiff's comptroller and computer-generated account statement listing invoices for goods sold and delivered to defendant that were unpaid as of August 10, 1990 were sufficient to make submissible case in action on account, even though plaintiff's comptroller admitted that final statement did not contain bottom line showing what was due and owing at time of trial. *Helmtec Industries, Inc. v. Motorcycle Stuff, Inc.*, 857 S.W.2d 334 (Mo.App. E.D. 1993).

26.04 [1981 Revision] Account Stated—Matured Debts

Your verdict must be for plaintiff if you believe:

First, after the transaction mentioned in evidence plaintiff and defendant agreed that the stated sum of $________ was the amount defendant owed plaintiff, and

Second, thereafter defendant [failed] [refused][1] to pay this stated sum.

* [unless you believe that plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction including affirmative defense of payment)*].

Notes on Use (1981 Revision)

1. Select appropriate term.

* Add if affirmative defense is submitted.

Research References

West's Key Number Digest
Contracts 🔑353(1)

Annotations

In general 1

1. In general

Verdict director on account stated, negating affirmative defenses of payment and statute of limitations. *Schwartz v. Fein*, 471 S.W.2d 679 (Mo.App. 1971).

26.05 [1980 Revision] Quantum Meruit—Goods or Services Furnished

Your verdict must be for plaintiff if you believe:

First, plaintiff furnished *(here describe generally the goods or the services)* to defendant, and

Second, defendant accepted such [goods] [services].[1]

* [unless you believe that plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 Revision)

1. Select appropriate term.

* Add if affirmative defense is submitted.

Committee Comment (1991 New)

A. This remedy goes under a variety of names including quantum valebant which was one of the common counts in an action of assumpsit. It is sometimes called quasi contract. The court in discussing this remedy in *Bennett v. Adams*, 362 S.W.2d 277, 281 (Mo.App. 1962) said:

> Contracts really implied in law are those which are imposed, or created, without regard to promise or intention of the party to be bound. The assent rests solely in legal fiction, and the liability created thereunder rests simply in reason and justice. The fictitious implication of agreement to pay the reasonable value arises (as one example) when services or things necessary to the recipient are furnished to an incompetent person. The fictitious contract is based primarily upon a benefit conferred upon the recipient of the goods or services. Running through all the cases which involve quantum meruit by reason of contract implied in law are the words “valuable” and “beneficial” services.

B. For a real estate commission case without a contract, see *Williams v. Enochs*, 742 S.W.2d 165 (Mo.banc 1987), where the court recommended a modification which combined MAI 29.02 (Sale Consummated—Agreed Commission) with MAI 26.05.

Research References

West’s Key Number Digest
Contracts ⚷353(10)

Legal Encyclopedias
C.J.S., Contracts § 1066

Annotations

In general 1
Evidentiary support 2

1. In general

Instruction on theory of quantum meruit was improper in excavator's action on account against property owners, because owners did not accept services provided by excavator. *Raysik v. Standiford*, 944 S.W.2d 288 (Mo.App. W.D. 1997).

Trial court should have given instruction for quantum meruit, not for action on account, in attorney's action to recover attorney fees, where no express contract existed between attorney and client. *Kalish v. Smith*, 824 S.W.2d 35 (Mo.App. E.D. 1991).

Pattern jury instruction for "action for quantum meruit" is appropriate for use when legal relationship between party is contract implied in law or quasi-contract, but not where remedy of quantum meruit may be pursued for breach of express contract. *Westerhold v. Mullenix Corp.*, 777 S.W.2d 257 (Mo.App. E.D. 1989).

Including the words "emergency repairs" in paragraph First was harmless error under the facts. *Kranz v. Kansas City*, 573 S.W.2d 88 (Mo.App. 1978).

Modified MAI 26.05 to submit plaintiff's claim for services rendered beyond agreed salary, and modified damages instruction for same. *Austin v. Kansas City General Hospital*, 570 S.W.2d 752 (Mo.App. 1978).

Not-in-MAI verdict director properly given in quantum meruit action submitted before adoption of MAI 26.05, the quantum meruit verdict director. *Kaiser v. Lyon Metal Products, Inc.*, 461 S.W.2d 893 (Mo.App. 1970).

2. Evidentiary support

Plaintiff contracted and was paid for specific work at stated price, but sued for "extras" done on estimated basis. Plaintiff's properly submitted on quantum meruit; not error to submit without reference to contract price. *Bodde v. Burnham*, 588 S.W.2d 516 (Mo.App. W.D. 1979).

26.06 [1981 Revision] Breach of Bilateral Contract—Terms and Breach in Issue

Your verdict must be for plaintiff if you believe:

First, plaintiff and defendant entered into an agreement whereby plaintiff agreed *(set out plaintiff's agreement)* and defendant agreed *(set out defendant's agreement)*, and

Second, plaintiff performed plaintiff's agreement, and

Third, defendant failed to perform defendant's agreement, and

Fourth, plaintiff was thereby damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 Revision)

* Add if affirmative defense is submitted.

Committee Comment (1973 New)

A. See *Gottlieb v. Hyken*, 448 S.W.2d 617 (Mo. 1970).

Research References

West's Key Number Digest
Contracts ⚷353(8)

Annotations

In general 1
Conversing 2

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1. In general

Error in giving instruction that required jury to determine whether there was coverage under insurance policy was harmless in insured's breach-of-contract action; insurer was not prejudiced given that policy covered insured's claim as a matter of law, and there was substantial evidence to support insured's claim. *D.R. Sherry Const., Ltd. v. American Family Mut. Ins. Co.*, 316 S.W.3d 899 (Mo.banc 2010).

Alternate constructions of ambiguous indemnification provision in shareholder agreement were not required to be submitted to jury; although jury instruction deviated slightly from MAI 26.02 and failed to require finding that defendant agreed to formula advanced by plaintiff, instructions stated that plaintiff and defendant entered into agreement and defendant failed to perform, enabling reasonable juror to understand that both plaintiff and defendant agreed to formula submitted in instruction. *Graham v. Goodman*, 850 S.W.2d 351 (Mo.banc 1993).

Where terms of contract were disputed it was error to give MAI 26.02 submitting only defendant's breach. *Varn Co. v. Hamiltonian Fed. Sav. & Loan Ass'n*, 488 S.W.2d 649 (Mo. 1973).

MAI 26.06 is not the proper instruction where a party disputes whether the contract should be enforced due to fraud or misrepresentation if the existence and terms of the contract are otherwise undisputed. *Oliver v. Ford Motor Credit Co., LLC*, 437 S.W.3d 352 (Mo.App. W.D. 2014).

Verdict-directing pattern instruction for action on account was properly given in excavator's action to recover payment against property owners who allegedly hired excavator to conduct lake excavation project, rather than instruction relating to breach of contract, although it was not clear whether parties had ever reached agreement as to project, as action on account was pled, and facts existed to support that claim. *Raysik v. Standiford*, 944 S.W.2d 288 (Mo.App. W.D. 1997).

Jury instruction given at trial on conditions for verdict for building owner against roofing contractor for breach of settlement agreement failed to substantially track Missouri Approved Instruction (MAI) elements requiring identification of building owner's obligations under agreement and requiring jury to find that owner performed those obligations. *Porta-Fab Corp. v. Young Sales Corp.*, 943 S.W.2d 686 (Mo.App. E.D. 1997).

In customer's breach of contract action against bank, trial court properly used as verdict-directing instruction approved instruction to be used for breach of bilateral contract action where breach is sole issue, rather than approved instruction to be used in breach of contract action when terms of agreement and its breach are at issue; although terms of agreement between bank and customer were disputed, that dispute was not determinative of the issues as submitted by the parties. *McMillan v. First State Bank of Joplin*, 935 S.W.2d 329 (Mo.App. S.D. 1996).

Instruction, which directed jury to reach verdict for agent in agent's anticipatory breach of contract action against professional football player following player's retention of another agent, if jury believed that parties "agreed" that agent would serve as player's contract advisor, and that player failed to perform his "agreement," was neither prejudicial nor plain error; though player claimed that the instruction improperly assumed facts in issue by using words "agreed" and "agreement," pattern instruction required jury to determine existence of binding agreement by finding that both parties had agreed, and trial court had submitted at player's request a true converse instruction with respect to the challenged issue. *Total Economic Athletic Management of America v. Pickens*, 898 S.W.2d 98 (Mo.App. W.D. 1995).

If plaintiff has not fully performed to exact and original contract specifications, instruction on full performance may not be used. *Lindsey Masonry Co., Inc. v. Jenkins & Associates, Inc.*, 897 S.W.2d 6 (Mo.App. W.D. 1995).

Failure to identify agreement for sale of chiropractic practice by date in jury instruction on breach of contract did not deviate from MAI 26.06; although more than one agreement was in evidence, there was no dispute at trial as to which agreement was at issue; instruction did not prejudice buyers, as buyers failed to object to instruction at trial, converse instruction required jury to focus on agreement in question, and sellers' counsel advised jury several times in closing argument as to which agreement was at issue. *Dierker Associates, D.C., P.C. v. Gillis*, 859 S.W.2d 737 (Mo.App. E.D. 1993).

It was prejudicial error to give verdict directing instruction based on MAI 26.02 in contract dispute over corporation's payment of additional funds into travel agent's escrow account where parties disputed whether contract required corporation to pay second deposit into account if there were enough funds to recover cost of actual number of trips in corporation's incentive travel program; MAI 26.02 is intended for use in situations where existence and terms of contract are undisputed and the sole question for jury to decide is whether defendant has breached that contract and, if so, the damage resulting; MAI 26.06 is to be used where the terms of the agreement and its breach are at issue. *James O'Brien & Associates, Inc. v. American Sportsman Travel, Inc.*, 819 S.W.2d 62 (Mo.App. E.D. 1991).

MAI 26.06 was not proper instruction where plaintiff was prevented from performing contract by defendants; MAI 26.06 only addresses a situation where plaintiff fully performed; giving of instruction modified after MAI 26.02 was not reversible error. *Smith Moore & Co. v. J.L. Mason Realty & Inv., Inc.*, 817 S.W.2d 530 (Mo.App. E.D. 1991).

Verdict director should have submitted dispute over what entitled sales representative to commissions on an account; verdict director only submitted undisputed terms of representative's agreement to be sales representative for carrier and carrier's agreement to pay five percent sales commission on gross revenue produced by representative's accounts, but all facts submitted in director could be resolved in favor of representative without any finding that he procured any account. *Penberthy v. Nancy Transp., Inc.*, 804 S.W.2d 404 (Mo.App. E.D. 1991).

In a breach of contract action where plaintiff was seeking damages for breach of both a written agreement and a subsequent oral agreement, it may have been improper to submit both contracts in one verdict-director, rather than in two separate instructions, but the plaintiff suffered no prejudice as a result. *Aluminum Prods. Enters., Inc. v. Fuhrmann Tooling & Mfg. Co.*, 758 S.W.2d 119, 125 (Mo.App. E.D. 1988).

In action for damages for breach of contract, where the terms of agreement were in dispute, trial court erred in submitting verdict-directing instruction based on MAI 26.06 that did not hypothesize plaintiff's version of the agreement and require jury to make a finding in that regard. *Schlemer v. Connell Agencies of Kimberling City, Inc.*, 741 S.W.2d 307 (Mo.App. S.D. 1987).

Submission of a quantum meruit theory by a verdict director submitting breach of a bilateral contract was error, and such error was compounded by the use of a bilateral contract verdict director with a quantum meruit damages instruction. Instructions which intermingle inconsistent guides for recovery are prejudicially erroneous. *Hall v. Cooper*, 691 S.W.2d 507 (Mo.App. W.D. 1985).

MAI 26.06 is appropriate where the jury issues are what agreement was made and whether the agreement was reached. *Boswell v. Steel Haulers, Inc.*, 670 S.W.2d 906 (Mo.App. W.D. 1984).

Where terms of an agreement are in dispute, the verdict directing instruction must hypothesize the proponent's version of the agreement actually made. Failure to submit to jury defendant's proposed construction of language previously held ambiguous by court was prejudicial error. *Reed Stenhouse, Inc. of Missouri v. Portnoy*, 642 S.W.2d 947 (Mo.App. E.D. 1982).

MAI 26.02 covers cases where the only issues are breach and resultant damage; where the issues are what agreement was made and if breached, MAI 26.06 is the proper instruction. *Braun v. Lorenz*, 585 S.W.2d 102 (Mo.App. W.D. 1979).

Plaintiffs' not-in-MAI verdict director for breach of house building contract, patterned after MAI 26.01, erroneous when terms of contract were in dispute. A modified MAI 22.06 would have been proper. *Forsythe v. Starnes*, 554 S.W.2d 100 (Mo.App. 1977).

Breach of agreement to pay fee for obtaining employment. *S.P. Personnel Associates, etc., v. Hospital Building & Equipment Co., Inc.*, 525 S.W.2d 345 (Mo.App. 1975).

Verdict director in action on contract to support illegitimate child. *C— S— v. J— W—*, 514 S.W.2d 848 (Mo.App. 1974).

Affirmative defense of duress in executing contract. *C— S— v. J— W—*, 514 S.W.2d 848, 852 (Mo.App. 1974).

2. Conversing

Plaintiff's modified MAI 26.06 hypothesized defendant's agreement to pay him commissions; defendant's converse directed a verdict if plaintiff was "not entitled to commissions." Condemned as a roving commission which did not negate an essential element of plaintiff's case. *Lawrie v. Continental Cas. Co.*, 555 S.W.2d 347 (Mo.App. 1977).

26.07 [1981 Revision] Breach of Bilateral Contract—When Substantial Performance Sufficient

Your verdict must be for plaintiff if you believe:

First, plaintiff and defendant entered into an agreement whereby plaintiff agreed *(set out plaintiff's agreement)* and defendant agreed *(set out defendant's agreement)*, and

Second, plaintiff substantially performed[1] plaintiff's agreement [in a workmanlike manner],[2] and

Third, defendant failed to perform defendant's agreement, and

Fourth, plaintiff was thereby damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 New)

1. The phrase "substantially performed" must be defined. See definition in MAI 16.04.

2. Submit bracketed clause only when quality of workmanship is in issue.

Caution: This instruction is not proper in all contract cases. This instruction may be used only in cases where substantial performance is legally sufficient. Use MAI 26.06 where substantial performance may not be submitted. Use MAI 4.08 as the damage instruction where substantial performance is submitted.

* Add if affirmative defense is submitted.

Committee Comment (1980 New)

A. This instruction would be appropriate where recovery is sought on a building contract. *Cross v. Robinson*, 281 S.W.2d 22 (Mo.App. 1955); *McAlpine Co. v. Graham*, 320 S.W.2d 951 (Mo.App. 1959); *Julian v. Kiefer*, 382 S.W.2d 723 (Mo.App. 1964); *State ex rel. Stites v. Goodman*, 351 S.W.2d 763 (Mo.banc 1961); *Southwest Engineering Co. v. Reorganized School District R-9*, 434 S.W.2d 743 (Mo.App. 1968); *Vic*

Koepke Excav. & Grading Co. v. Kodner Dev. Co., 571 S.W.2d 253 (Mo.banc 1978).

Research References

West's Key Number Digest
Contracts ⚷353(8)

Legal Encyclopedias
C.J.S., Contracts § 1065

Annotations

1. In general

"Substantial performance" jury instruction was properly submitted in subcontractor's breach of contract action against general contractor, despite subcontractor's claim that each of three allegedly breaches of contract was sufficient to give rise to claim of total breach of agreement; project was uncompleted, no term of parties' contract was in dispute, and, in any event, subcontractor was not prejudiced thereby, as finding that it "substantially performed" was lesser burden of proof. *Lindsey Masonry Co., Inc. v. Jenkins & Associates, Inc.*, 897 S.W.2d 6 (Mo.App. W.D. 1995).

A court may properly submit MAI 26.07 when substantial performance upon the part of the plaintiff is legally sufficient to support a verdict in plaintiff's favor where defendant has breached its contractual obligations. It is impermissible to modify MAI 26.07 to require the jury to evaluate whether defendant substantially performed their agreement. *Kim v. Conway & Forty, Inc.*, 772 S.W.2d 723, 727 (Mo.App. E.D. 1989).

27.00

EJECTMENT

27.01 Verdict Directing—Ejectment Against a Stranger
27.02 Verdict Directing—Ejectment Against Co-tenant
27.03 Verdict Directing—Ejectment—Damages Only
27.04 Verdict Directing—Ejectment—Counterclaim for Value of Improvements
27.05 Damages—Ejectment
27.06 Definition—Good Faith in Ejectment

Research References

West's Key Number Digest
Ejectment 🔑110

A.L.R. Library
A.L.R. Index, Ejectment, Eviction, and Ouster
West's A.L.R. Digest, Ejectment 🔑110

Legal Encyclopedias
Am. Jur. 2d, Ejectment § 41
C.J.S., Ejectment § 199

27.01 [1981 Revision] Verdict Directing—Ejectment Against a Stranger

Your verdict must be for plaintiff if you believe:

First, defendant was in possession of the premises claimed by plaintiff on *(state the date action for ejectment was commenced)*, and

Second, plaintiff had the right to possession of the premises on that date by reason of *(set out basis of right to possession)*.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1981 Revision)

This instruction is to be used in cases in which the plaintiff claims either nominal damages or substantial damages. The finding of a right to possession carries with it the right to at least nominal damages. *Curd v. Reaban*, 232 S.W.2d 389 (Mo. 1950).

* Add if affirmative defense is submitted.

Research References

West's Key Number Digest
Ejectment ⚷110

Annotations

1. In general

Landowners could not recover from adjoining landowners in ejectment action brought to determine boundary between their properties, absent evidence that adjoining landowners were in possession of disputed area. *Allen v. Welch*, 770 S.W.2d 521, 523 (Mo.App. E.D. 1989).

Verdict directing instruction on ejectment erroneous for failure to negate defensive instruction on title by limitation. *Kammerer v. Cella*, 585 S.W.2d 552 (Mo.App. E.D. 1979).

27.02 [1981 Revision] Verdict Directing—Ejectment Against Co-tenant

Your verdict must be for plaintiff if you believe:

First, defendant was in possession of the premises claimed by plaintiff on *(state the date action for ejectment was commenced)*, and

Second, plaintiff had the right to [joint][1] possession on that day by reason of *(set out basis of right to possession or joint possession)*, and

Third, defendant *(set out the conduct of the defendant amounting to a total denial of plaintiff's right to entry and possession as a co-tenant, such as "barred plaintiff from the premises" or "ousted plaintiff from the premises").*

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1981 Revision)

1. Insert if appropriate to avert requirement that plaintiff co-tenant or joint tenant must be found entitled to exclusive possession.

This instruction is to be used by a plaintiff claiming either nominal damages or substantial damages.

* Add if affirmative defense is submitted.

Research References

West's Key Number Digest
Ejectment ⚷110

27.03 [1978 New] Verdict Directing—Ejectment—Damages Only

Your verdict must be for plaintiff if you believe:

First, defendant was in possession of the premises claimed by plaintiff on *(state the date action for ejectment was commenced)*, and

Second, plaintiff had the right to [joint][1] possession of the premises on that day by reason of *(state basis of right to possession or joint possession, such as "being a tenant" or "being a joint tenant")*, and

Third, defendant had knowledge of plaintiff's claim to possession of the premises on *(insert date)*, and

Fourth, defendant remained in possession thereafter.[2]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1978 New)

1. Insert if appropriate to avert requirement that plaintiff co-tenant or joint tenant must be found entitled to exclusive possession.

2. If action is against a co-tenant, use this Paragraph Third in lieu of Paragraphs Third and Fourth above:

> "Third, the defendant *(set out the conduct of defendant amounting to a total denial of plaintiff's right to entry and possession as co-tenant, such as 'ousted plaintiff from the premises')*".

* Add if affirmative defense is submitted.

Committee Comment (1978 New)

A. The right to possession on the day the action for ejectment is commenced must exist or ejectment will not lie; however, if the right to possession is based on a lease or other terminable right, the right to possession may no longer exist at the time of trial. If plaintiff's right to possession has terminated, a writ of possession cannot be granted. The only claim remaining will be for damages. This is the instruction approved for use in that circumstance.

Research References

West's Key Number Digest
Ejectment ⚷110

Annotations

1. In general

In action seeking damages for interference with easement, jury should not have been instructed based on ejectment damage instruction MAI 27.03. Liability for damages caused by interference or obstruction of easement is based upon nuisance instruction MAI 22.06. *Gilbert v. K.T.I., Inc.*, 765 S.W.2d 289, 294, 297 (Mo.App. W.D. 1988).

27.04 [1981 Revision] Verdict Directing—Ejectment—Counterclaim for Value of Improvements

If your verdict is for plaintiff on plaintiff's claim for possession of the premises, your verdict must be for defendant on defendant's counterclaim if you believe:

First, defendant entered into possession of the premises under a good faith[1] claim of title to the premises and without knowledge of plaintiff's claim to possession, and

Second, the improvements were made in good faith[1] on the premises prior to defendant's having notice of plaintiff's claim to possession of the premises.

* [unless you believe defendant is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1981 Revision)

1. The phrase "good faith" must be defined. See definition in MAI 27.06.

* Add if affirmative defense is submitted.

Committee Comment (1978 New)

A. The right of the defendant to recover for improvements is provided for in § 524.160, RSMo. Section 524.170, RSMo requires that the defendant show that the improvements were made in good faith. Sections 524.190 through 524.230, RSMo provide for alternate remedies such as relinquishing the improved land to the defendant but requiring defendant to pay the plaintiff the value of the land or for partition between plaintiff and defendant. If these remedies are at issue, some modifications of the instructions may be required.

Research References

West's Key Number Digest
Ejectment ⚷110

27.05 [2012 Revision] Damages—Ejectment

If you find in favor of plaintiff, then you must award plaintiff such sum as you may find from the evidence [to be the difference between the fair market value[1] of the property before it was damaged and its fair market value[1] after it was damaged][2, 3] [(plus such sum as you may find from the evidence)[4] will fairly and justly compensate plaintiff for the loss of rents and profits from the date defendant received notice of plaintiff's right to possession to the date of your verdict][5, 3] [will fairly and justly compensate plaintiff for deprivation of possession of the property from the date defendant had notice of plaintiff's claim to possession to the date of your verdict].[6, 3] [You must also state separately in your verdict such sum as you reasonably find to be the monthly value of the rents and profits from the property at the time of your verdict.][7]

Notes on Use (2002 Revision)

1. The phrase "fair market value" must be defined. See MAI 16.02.

2. Use only if there is evidence of waste committed by the defendant after notice of plaintiff's claim of possession.

3. If the notice of plaintiff's claim to possession was received by defendant more than five years prior to commencement of the action, the bracketed material must be modified to limit the period of damage to five years next preceding the filing of the action.

4. Use the parenthetical material if damage assessments for both waste and loss of rents and profits are supported by the evidence.

5. Use if there is evidence of the loss of rents and profits.

6. Use only if there is no evidence of either waste or loss of rents and profits. The jury's verdict supporting a writ of ejectment justifies the award of nominal damages without evidence of substantial damages.

7. The plaintiff is entitled to damages for loss of rents and profits between the date of the verdict and the date of restoration of possession; the monthly rate is determined by the jury; the multiplication is performed and the judgment for such post-verdict damages is entered by the judge. Use bracketed material only when defendant holds possession on date of verdict, plaintiff's right of possession has not expired and there is evidence to support the jury's finding of the monthly rate.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

Committee Comment (2012 New)

A. Actions for Ejectment are statutory. §§ 524.010 *et seq.*, RSMo. The measure of damages may include "waste and injury", § 524.110, RSMo, which is shown by comparing the difference in the fair market value of the property before and after the damage; lost "rents and profits", § 524.110, RSMo, subject to certain time limitations and which must be supported by evidence, *Atkinson v. Smothers*, 291 S.W.2d 645 (Mo.App. E.D. 1956); and nominal damages in the event there are no demonstrable lost rents and profits. *Curd v. Reaban*, 232 S.W.2d 389 (Mo. 1950); *Atkinson, supra.*

Historical Note

(MAI 27.05 replaces the prior MAI 4.10 from the 6th Edition).

Research References

West's Key Number Digest
Ejectment ⚷110

Legal Encyclopedias
C.J.S., Ejectment § 199

27.06 [2012 Revision] Definition—Good Faith in Ejectment

The phrase "good faith" as used in this [these] instruction[s] means the absence of any intention to defraud or take unfair advantage of anyone else who might have a better right than defendant to possession of the premises.

Notes on Use (1978 New)

When the phrase "good faith" is used in MAI 27.04 in an ejectment case, it must be defined. Where the phrase is used in only one instruction, this definition may be added to the instruction using the term. If it is used in more than one instruction, the definition should be given as a separate instruction.

Committee Comment (1978 New)

A. This definition of the phrase "good faith" conforms to the statutory requirement of good faith in constructing improvements for which a defendant may recover in an ejectment case. Before using this definition in other than an ejectment case, the substantive law should be checked to determine its accuracy in the contemplated use.

Historical Note

(MAI 27.06 replaces the prior MAI 16.03 from the 6th Edition).

Research References

West's Key Number Digest
Ejectment ⚷110

28.00

VERDICT DIRECTING—SERVICES FURNISHED DECEDENT

28.00 General Comment
28.01 Recovery for Services Furnished Decedent Under Express Contract Where Family Relationship Is Admitted or an Issue
28.02 Recovery for Services Furnished Decedent Under Implied Contract Where Family Relationship Is Admitted or an Issue
28.03 Action Against Estate by One Admittedly Not in a Family Relationship
28.04 Quantum Meruit Recovery Sought Where Family Relationship Is an Issue

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Research References

West's Key Number Digest
Executors and Administrators 🔑451(3)

A.L.R. Library
A.L.R. Index, Executors and Administrators
West's A.L.R. Digest, Executors and Administrators 🔑451(3)

28.00 [1980 Revision] General Comment

A. Actions to recover for services to decedents can be divided into two kinds. In one, the plaintiff is *not* in a family relationship with the decedent and is hereinafter called a stranger. (MAI 28.03 and 28.04). In the other, the plaintiff *is* in a family relationship with the decedent. (MAI 28.01 and 28.02).

Actions by Stranger

B. "Absent a family relationship, where one performs valuable services for another, the benefit of which has been received and enjoyed by him, the law presumes an intention on the part of the former to charge and the latter to pay the reasonable value thereof . . .." *Smith v. Estate of Sypret*, 421 S.W.2d 9, 14 (Mo. 1967).

C. When a stranger furnishes services to a decedent which decedent accepts, the rule of quantum meruit allows recovery and is barred if the defendant establishes an intent by the stranger to make a gift. This is an affirmative defense. *Lauf v. Wiegersen*, 17 S.W.2d 369, 371 (Mo.App. 1929).

Defense Instructions Where Plaintiff Is a Stranger

D. When claim is made by a stranger, the defendant may offer the affirmative defense of payment using MAI 32.14 or the affirmative defense that services were furnished gratuitously, using MAI 32.15.

Actions by Persons in a Family Relationship

E. When services are performed by one who is in a family relationship with decedent, "recovery must be upon an express contract, or from evidence from which it can be reasonably concluded that there was a distinct understanding and agreement, understood and acted upon between the parties, a contract established on inference rather than implication." *Smith v. Davis' Estate*, 206 Mo.App. 446, 459, 230 S.W. 670, 673 (1921). *See also Kopp v. Traders Gate City Nat. Bank*, 357 Mo. 659, 665, 210 S.W.2d 49, 51

(Mo.banc 1948); *Lipperd v. Lipperd's Estate*, 181 Mo.App. 106, 163 S.W. 934 (1914).

F. In *Steva v. Steva*, 332 S.W.2d 924, 926 (Mo. 1960), the term "family," within the rule under discussion, was defined as "a collective body of persons under one head and one domestic government, who have reciprocal, natural, or moral duties to support and care for each other." For further definition see *Smith v. Estate of Sypret*, 421 S.W.2d 9, 14 (Mo. 1967).

G. If plaintiff admits a "family relationship" with decedent, or if this relationship is in issue, plaintiff may submit on the basis of express contract, using MAI 28. 01, or on a contract implied by the conduct of the parties, using MAI 28.02.

Defense Instructions Where Plaintiff Is In a Family Relationship

H. As recovery by one admittedly in a family relationship can only be had on the basis of an express or implied contract, defendants would normally converse one or more elements of the plaintiff's case in the same manner as other contract actions are conversed. Or, defendant may submit the affirmative defense of payment, MAI 32.14.

Defense Instructions

I. See affirmative defense instructions, MAI 32.14 to 32.16.

Damages

J. MAI 4.07 should be used. See *Ridinger v. Harbert*, 409 S.W.2d 764, 768 (Mo.App. 1966).

Research References

West's Key Number Digest
Executors and Administrators 🔑451(3)

28.01 [1969 New] Recovery for Services Furnished Decedent Under Express Contract Where Family Relationship Is Admitted or an Issue

Your verdict must be for plaintiff if you believe:

First, plaintiff and *(name of decedent)* agreed that plaintiff would *(here describe services performed)* and *(name of decedent)* would pay for such services, and

Second, these services were thereafter furnished to *(name of decedent)* by plaintiff.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1991 Revision)

* Add if affirmative defense is submitted.

Caution: Lawyers must be sure that they have evidence of an express contract before using this instruction. If the evidence shows only an agreement by implication, MAI 28.02 should be used.

Committee Comment (1969 New)

A. See General Comment at MAI 28.00.

Research References

West's Key Number Digest
Executors and Administrators ⚷451(3)

28.02 [1969 New] Recovery for Services Furnished Decedent Under Implied Contract Where Family Relationship Is Admitted or an Issue

Your verdict must be for plaintiff if you believe:

First, plaintiff furnished valuable services to *(name of decedent)*, and

Second, *(name of decedent)* accepted the benefits of such services, and

Third, the conduct and relationship of plaintiff and *(name of decedent)* was such as to imply an agreement that payment would be made for such services.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1969 New)

* Add if affirmative defense is submitted.

Caution: This is not a quantum meruit recovery. The record must contain evidence "from which it may reasonably be inferred that there was an agreement or mutual understanding the claimant was to be remunerated for the services rendered." *Kopp v. Traders Gate City National Bank*, 357 Mo. 659, 210 S.W.2d 49, 51 (Mo.banc 1948).

Committee Comment (1969 New)

A. See General Comment at MAI 28.00.

Research References

West's Key Number Digest
Executors and Administrators ⚷451(3)

Annotations

1. In general

Where plaintiff went to jury on MAI 28.02, *Implied Contract*, it was error to give defendant's MAI 32.16, appropriate only where plaintiff submits on quantum meruit. *Sturgeon v. Estate of Wideman*, 631 S.W.2d 55 (Mo.App. E.D. 1981).

28.03 [1969 New] Action Against Estate by One Admittedly Not in a Family Relationship

Your verdict must be for plaintiff if you believe:

First, plaintiff furnished to *(name of decedent)* valuable services, and

Second, *(name of decedent)* accepted the benefits of such services.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1969 New)

* Add if affirmative defense is submitted.

Committee Comment (1969 New)

A. See General Comment at MAI 28.00.

Research References

West's Key Number Digest
Executors and Administrators ⚷451(3)

Annotations

1. In general

Instruction given by trial court in farmer's action to recover the fair value of services he performed on behalf of his neighbor was not improper for failing to inform jurors that services had to be rendered at neighbor's request. *Jones v. Estate of McReynolds*, 762 S.W.2d 854, 856 (Mo.App. E.D. 1989).

28.04 [1969 New] Quantum Meruit Recovery Sought Where Family Relationship Is an Issue

Your verdict must be for plaintiff if you believe:

First, plaintiff furnished to *(name of decedent)* valuable services, and

Second, *(name of decedent)* accepted the benefits of such services.

* [unless you believe that plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1969 New)

* Add if affirmative defense is submitted.

Committee Comment (1969 New)

A. Where plaintiff has no evidence of an express contract or a contract implied from the conduct of the parties, plaintiff must rely on quantum meruit to recover.

B. Plaintiff is entitled to recover on the above facts unless some affirmative defense is shown. The existence of a family relationship is an affirmative defense. In *Muench v. South Side National Bank*, 251 S.W.2d 1, 4 (Mo. 1952) the court said:

> Defendant does not plead the existence of a family relationship, giving rise to the presumption that the services were gratuitous, but denies everything. Such a defense is special and affirmative, is in the nature of confession and avoidance and should have been pleaded, if it were to be relied upon.

Defendants should submit the issue by using MAI 32.16.

C. It is not clear whether a child may recover in quantum meruit for services furnished a parent even though the child and parent were not living in the same household when the services were rendered. See General Comment at 28.00. For this reason it may be safer for a child to sue on a contract implied in fact using the form shown at MAI 28.02.

Research References

West's Key Number Digest
Executors and Administrators ⚷451(3)

29.00

VERDICT DIRECTING—REAL ESTATE COMMISSION

29.01 Sale Not Consummated
29.02 Sale Consummated—Agreed Commission
29.03 Sale Consummated—No Agreed Commission
29.04 Sale Consummated—Exclusive Right to Sell
29.05 Sale Prevented by Owner [Withdrawn 1980]

Research References

West's Key Number Digest
Brokers 🔑88(7)

A.L.R. Library
A.L.R. Index, Commissions; Factors and Commission Merchants; Sale or Transfer of Property
West's A.L.R. Digest, Brokers 🔑88(7)

29.01 [1978 Revision] Sale Not Consummated

Your verdict must be for plaintiff if you believe:

First, plaintiff was a licensed real estate broker, and

Second, plaintiff and defendant agreed that plaintiff should receive ________% of the sale price as commission if plaintiff produced a purchaser[1] [who was ready, willing and able][2] to purchase[1] the property for $________ *(plus any other terms of purchase which are in issue)* and

Third, plaintiff did produce a purchaser[1] [who was ready, willing and able][2] to purchase[1] for such price *(and on such terms)*[3] and so informed defendant.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1978 Revision)

1. If a lessee was produced substitute the words "tenant" "rent" and "rental".

2. Submit only where sale was not completed.

3. Add this phrase if additional terms of agreement submitted in Paragraph Second.

* Add if affirmative defense is submitted.

Committee Comment (1996 Revision)

A. In regard to the question of whether or not the plaintiff is a licensed real estate broker, § 339.160, RSMo, provides:

> No person, partnership, corporation or association engaged within this state in the business or acting in the capacity of a real estate broker or real estate salesperson shall bring or maintain an action in any court in this state for the recovery of compensation for services rendered in the buying, selling, exchanging, leasing, renting or negotiating a loan upon any real estate without alleging and proving that such person, partnership, corporation, or association was a licensed real

estate broker or salesperson at the time when the alleged cause of action arose.

For action by a non-real estate broker, *see Dolan v. Ramacciotti*, 462 S.W.2d 812 (Mo. 1970).

B. *See Reed Schmidt and Assoc. v. Carafiol Furniture Co.*, 469 S.W.2d 876 (Mo.App. 1971), where a new trial was granted based upon plaintiff's failure to allege and prove that it was a licensed real estate broker, even though the question was first raised when the instructions were being considered and the issue does not appear to have been in dispute. *But see Dickey Co. v. Kanan*, 537 S.W.2d 430 (Mo.App. 1976).

C. Paragraph Second contains the phrase ". . . a purchaser who was ready, willing and able to purchase . . .," proof of which may properly be omitted if the seller has entered into a contract with the buyer for the sale; *Kelly v. Craigmiles*, 460 S.W.2d 577 (Mo. 1970).

D. In *Blackburn-Ens, Inc. v. Roberts*, 379 S.W.2d 630, 633 (Mo.App. 1964), the Court quoted an earlier opinion saying, "the general rule is that if a broker procures a purchaser who is ready, willing and able to buy on the seller's terms, the broker is entitled to his commission whether or not the sale is consummated." *See also Lund v. Dalton*, 384 S.W.2d 825 (Mo.App. 1964).

E. Rule 55.08 states that payment is an affirmative defense.

F. Real estate contracts vary in content and lawyers must be sure to submit to the jury any additional issues which their specific cases may contain. "Usually, a broker earns his commission when he produces a purchaser ready, willing and able to purchase upon the terms specified by the owner, whether the transaction be closed or not, or upon terms satisfactory to the owner. However, owners and their brokers, like others, may by their expressed contract condition liability upon prescribed events, contingencies or conditions precedent." *Tant v. Gee*, 348 Mo. 633, 154 S.W.2d 745, 747 (1941).

G. *See also Sargent v. Wekenman*, 374 S.W.2d 635, 639 (Mo.App. 1964) where an instruction was held erroneous because it failed to hypothesize that plaintiff produced a lessee who would take on the conditions imposed by the lessor. The Court said: ". . . In order to recover his commission a real estate broker must show that he produced a buyer ready, willing and able to buy on the terms set by the owner or those satisfactory to him . . .. And the same rule applies to a broker employed to find a lessee."

Research References

West's Key Number Digest
Brokers ⚷88(7)

Annotations

Modification 1

Terms of agreement 2

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1. Modification

Where defendant-owner improperly introduced evidence that sales contract was breached after defendant had accepted the buyer broker had produced, court properly gave a cautionary instruction that breach did not affect broker's right to commission. *Kelly v. Craigmiles*, 460 S.W.2d 577 (Mo. 1970).

Where defendant-owner accepted customer produced by broker, MAI 29.01 was properly modified by deleting the ready-willing-and-able clause and hypothesizing that the customer had executed a contract to buy owner's land. *Kelly v. Craigmiles*, 460 S.W.2d 577 (Mo. 1970).

Broker's verdict director necessarily modified in action seeking commission from a purchaser. This was not an improper deviation from an applicable MAI. *Reed Schmidt & Associates, Inc., v. Carafiol Furniture Co.*, 469 S.W.2d 876 (Mo.App. 1971).

2. Terms of agreement

Undisputed terms of purchase of apartment building need not have been included in instruction based on MAI 29.01 in broker's action to recover commission. *Meridian Interests, Inc. v. J.A. Peterson Enterprises, Inc.*, 693 S.W.2d 179 (Mo.App. W.D. 1985).

Where terms of agency contract were disputed, the ultimate facts of the terms should have been hypothesized. *Zellmer Real Estate, Inc. v. Brooks*, 559 S.W.2d 594 (Mo.App. 1977).

29.02 [1978 Revision] Sale Consummated—Agreed Commission

Your verdict must be for plaintiff if you believe:

First, plaintiff was a licensed real estate broker, and

Second, plaintiff and defendant agreed that plaintiff should receive ________% of the sale price of defendant's property as commission if defendant's property was sold as a result of plaintiff's efforts, and

Third, defendant sold the property as a direct result of plaintiff's efforts.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1978 Revision)

* Add if affirmative defense is submitted.

This instruction is appropriate where the only issues are whether defendant hired plaintiff to sell his property and whether plaintiff was the procuring cause of the sale.

Committee Comment (1991 Revision)

A. In *Ingram v. Clemens*, 350 S.W.2d 823 (Mo.App. 1961), defendants contended that plaintiff's verdict-directing instruction was erroneous because it failed to hypothesize that the acts of plaintiff were the procuring and inducing cause of the sale. The Court said:

> The Instruction told the jury that if they found from the evidence that defendants listed their . . . farm . . . for sale with the plaintiff . . . as their agent, and agreed with the plaintiff that if he would find a purchaser therefor, and a sale was made to said purchaser, the defendants . . . would pay to the plaintiff the sum of 5% commission . . .; and if the jury further found . . . that plaintiff did find and did procure . . . purchasers . . . and that the said (purchasers) did buy . . . the verdict would be for plaintiff. *Id.* at 824.

The instruction was held to have submitted every essential fact.

B. *See Reed Schmidt & Assoc. v. Carafiol Furniture Co.*, 469 S.W.2d

876 (Mo.App. 1971), where a new trial was granted based upon plaintiff's failure to allege and prove that it was a licensed real estate broker, even though the question was first raised when the instructions were being considered and the issue does not appear to have been in dispute. *But see Dickey Co. v. Kanan*, 537 S.W.2d 430 (Mo.App. 1976).

C. For a real estate commission case without a contract, see *Williams v. Enochs*, 742 S.W.2d 165 (Mo.banc 1987), where the Court recommended a modification which combined MAI 29.02 with MAI 26.05 (Quantum Meruit).

Research References

West's Key Number Digest
Brokers ⚷88(7)

Annotations

Evidentiary support 1
Implied contracts 2

1. Evidentiary support

Error to give verdict director submitting alternate hypothesis for means of payment when only one had evidentiary support. *Dickey Co. v. Kanan*, 486 S.W.2d 33 (Mo.App. 1972).

2. Implied contracts

MAI 29.02, addressing whether real estate broker is entitled to commission under express contract, does not apply to issue of commission under implied contract. *Incentive Realty, Inc. v. Hawatmeh*, 983 S.W.2d 156 (Mo.App. E.D. 1998).

29.03 [1978 Revision] Sale Consummated—No Agreed Commission

Your verdict must be for plaintiff if you believe:

First, plaintiff was a licensed real estate broker, and

Second, defendant employed plaintiff to sell defendant's property, and

Third, defendant's property was sold as a direct result of plaintiff's efforts.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1978 Revision)

* Add if affirmative defense is submitted.

Committee Comment (1978 Revision)

A. In *Groves Bros. & Co. v. Schell*, 379 S.W.2d 857 (Mo.App. 1964), plaintiff obtained a lessee for defendant's property. No commission was agreed upon. Plaintiff's verdict-directing instruction was challenged but affirmed on appeal. The Court said at page 860:

> A verdict directing instruction must hypothesize all of the elements of plaintiff's case essential for him to recover . . .. The instruction requires that the jury find the employment of plaintiff by defendant to lease the property, that plaintiff first solicited Mr. Lillis as a lessee and brought his name to defendant as a prospective lessee and that Mr. Lillis did lease the property from defendant. Those are the essential facts required to be found in this case.

B. See also *O'Neal v. Mavrakos Candy Co.*, 364 Mo. 467, 263 S.W.2d 430 (Mo.banc 1953), where the elements of recovery on quantum meruit are discussed.

C. See *Reed Schmidt & Assoc. v. Carafiol Furniture Co.*, 469 S.W.2d 876 (Mo.App. 1971), where a new trial was granted based upon plaintiff's failure to allege and prove that it was a licensed real estate broker, even though the question was first raised when the instructions were being considered and the issue does not appear to have been in dispute. *But see Dickey Co. v. Kanan*, 537 S.W.2d 430 (Mo.App. 1976).

Research References

West's Key Number Digest
Brokers ⚷88(7)

29.04 [1978 Revision] Sale Consummated—Exclusive Right to Sell

Your verdict must be for plaintiff if you believe:

First, plaintiff was a licensed real estate broker, and

Second, plaintiff and defendant agreed that for ________ days plaintiff should have the exclusive right to sell defendant's property and that plaintiff would use reasonable efforts to sell it, and

Third, defendant agreed that if the property was sold within the exclusive sale period defendant would pay plaintiff ________% of the sale price, and

Fourth, defendant's property was sold within the exclusive sale period.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1978 Revision)

* Add if affirmative defense is submitted.

Committee Comment (1978 Revision)

A. "In the absence of any contractual provision to the contrary, the general rule is that when the owner of real estate places it in the hands of a broker for sale he does not thereby relinquish his right to sell the property himself or through a second broker, without the first broker's aid, and without being liable to the first broker for any commission.

B. "A different situation exists if the right to sell granted to the broker is exclusive, or if the contract provides for the broker to be compensated regardless of who may make the sale during the term of the contract. In such event the owner would be liable to the broker for the commission specified in the contract if the sale was made either by the owner alone or through another broker." *Byers Bros. Real Estate & Ins. Agency Inc. v. Campbell*, 329 S.W.2d 393, 396 (Mo.App. 1959). *See also Lund v. Dalton*, 384 S.W.2d 825 (Mo.App. 1964).

C. See *Reed Schmidt & Assoc. v. Carafiol Furniture Co.*, 469 S.W.2d

876 (Mo.App. 1971), where a new trial was granted based upon plaintiff's failure to allege and prove that it was a licensed real estate broker, even though the question was first raised when the instructions were being considered and the issue does not appear to have been in dispute. *But see Dickey Co. v. Kanan*, 537 S.W.2d 430 (Mo.App. 1976).

Research References

West's Key Number Digest
Brokers ⚷88(7)

29.05 [1980 Withdrawn] Sale Prevented by Owner

30.00

VERDICT DIRECTING—THIRD PARTY PLAINTIFF

30.01 Surety Against Principal
30.02 Master Against Servant
30.03 Retailer Against Wholesaler

Research References

West's Key Number Digest

Labor and Employment 🔑2798, 2829; Principal and Surety 🔑190(1); Products Liability 🔑420

A.L.R. Library

A.L.R. Index, Principal and Surety

West's A.L.R. Digest, Labor and Employment 🔑2798, 2829; Principal and Surety 🔑190(1); Products Liability 🔑420

Legal Encyclopedias

Am. Jur. 2d, Employment Relationship § 352

C.J.S., Employer's Liability § 401; Principal and Surety § 272; Products Liability § 206

30.01 [1969 New] Surety Against Principal

If your verdict is in favor of *(plaintiff's name)* and against *(surety)* then your verdict must also be for *(surety)* against *(principal)* for the same amount.

* [unless you believe *(surety)* is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1980 Revision)

* Add if affirmative defense is submitted.

In most cases the basic duty to indemnify will not be in dispute. If such a dispute exists the instruction must be modified to submit the ultimate issues in dispute.

Committee Comment (1969 New)

A. A number of Missouri cases have held that the surety cannot recover from the principal until the surety has paid.

B. Rule 52.11 authorizing impleading one who is or *may* be liable to defendant for all or part of plaintiff's claim against defendant appears to supersede the earlier view.

C. The federal equivalent, Federal Rule 14, has been construed to authorize such impleader actions.

D. In *American Surety Co. v. Morton*, 22 F.R.D. 261 (E.D.Ill. 1958), the court said:

> It is axiomatic that a surety is subrogated and succeeds to the right owned by the party whose obligation the surety becomes liable to pay. Therefore, it would seem that where, as here, the surety is made defendant in an action as a result of the defalcation of the party whose obligation the surety has guaranteed, that surety may properly make such party a third-party defendant to an action in which the surety is charged or is attempted to be charged for the obligation.

E. In *Glens Falls Indemnity Co. v. Atlantic Building Corp.*, 199 F.2d 60 (4th Cir. 1952), the court said:

> It is true in South Carolina and elsewhere that the right of subrogation may not be recognized unless the party asserting it has paid the debt on which the right of subrogation is based. *American Surety Co. v. Hamrick Mills*, 191 S.C. 362, 4 S.E.2d

308, 124 A.L.R. 1147. But this rule applies when the indemnitor brings a separate suit against the person whose action has caused the loss. Rule 14 was designed to prevent this circuity of action and to enable the rights of an indemnitee against an indemnitor and the rights of the latter against a wrongdoer to be finally settled in one and the same suit. It is generally held that it is no obstacle to a third party action that the liability, if any, of the third party defendant can be established only after that of the original defendant and after the satisfaction of the plaintiff's claim, where subrogation is the basis of the claim.

F. *See also* Barron and Holtzoff, Federal Practice and Procedure, § 421 *et seq.*; Moore, Federal Practice ¶ 14.08 and ¶ 14.10.

Research References

West's Key Number Digest
Principal and Surety ⚷190(1)

Legal Encyclopedias
C.J.S., Principal and Surety § 272

Annotations

1. In general

MAI 27.01 [Now 30.01] properly modified as a verdict director against third-party defendant where jury found for plaintiff against defendant (third-party plaintiff). *Kahn v. Prahl*, 414 S.W.2d 269 (Mo. 1967).

30.02 [1969 New] Master Against Servant

If your verdict is in favor of *(plaintiff's name)* and against *(master's name)* then your verdict must also be in favor of *(master's name)* against *(servant's name)* for the same amount.

* [unless you believe *(master's name)* is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1969 New)

* Add if affirmative defense is submitted.

This instruction may be used where master brings in servant as a third party defendant or where master and servant are sued jointly and master cross-claims against servant.

Committee Comment (1969 New)

A. In *State ex rel. Algiere v. Russell*, 359 Mo. 800, 223 S.W.2d 481 (Mo.banc 1949), the Court quoted with approval the following statement from the Restatement of Agency:

> "Unless he has been authorized to act in the manner in which he acts, the agent who subjects his principal to liability because of a negligent or other wrongful act is himself subject to liability to the principal for the loss which results therefrom. This includes the payment of damages by the principal to the third person, . . . Thus, a servant who, while acting within the scope of his employment, negligently injures a third person, although personally liable to such person, is also subject to liability to the principal if the principal is thereby required to pay damages."

Research References

West's Key Number Digest
Labor and Employment ⚷2798, 2829

Legal Encyclopedias
C.J.S., Employer's Liability § 401

30.03 [1969 New] Retailer Against Wholesaler

If your verdict is in favor of *(plaintiff's name)* and against *(defendant's name)* then your verdict must also be for *(defendant's name)* against *(third party defendant's name)* for the same amount if you believe:

First, *(third party defendant's name)* sold the *(describe the substance)* to *(defendant's name)* to be retailed by *(defendant's name)* to others who would [drink] [eat][1] it, and

Second, that *(describe the substance)* when sold by *(third party defendant's name)* to *(third party plaintiff's name)* was not fit for [human] [animal][1] consumption.

* [unless you believe *(third party plaintiff's name)* is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1991 Revision)

1. Select the appropriate term.

* Add if affirmative defense is submitted.

Committee Comment (2012 Revision)

A. This instruction may be used where manufacturer is brought in as a third-party defendant or where retailer and manufacturer are sued as joint defendants and retailer cross-claims against manufacturer in a case brought under MAI 25.02 breach of common law implied warranty of fitness for consumption. In cases involving comparative fault, see Chapter 37.00 and MAI 4.12, 4.13 and 4.14.

Research References

West's Key Number Digest
Products Liability ⚷420

Legal Encyclopedias
C.J.S., Products Liability § 280

31.00

VERDICT DIRECTING—MISCELLANEOUS

31.00 General Negligence—Single Negligent Act Submitted
31.01 Negligently Furnishing Dangerous Instrumentality or Product [Withdrawn 1978]
31.02(1) Res Ipsa Loquitur—Pedestrian
31.02(2) Res Ipsa Loquitur—Bus Passenger
31.02(3) Res Ipsa Loquitur—General
31.03 Explosives
31.04 Loss of Consortium, Loss of Services or Medical Expenses—Spouse or Child Injured—For EITHER Comparative Fault or Non-Comparative Fault Submissions
31.05 Eminent Domain [Withdrawn 2008]
31.06 Will Contest [Withdrawn 2012]
31.07 Amount of Damages Only Issue [Withdrawn 2016]
31.07(A) Admission of Liability—Amount of Damages Only Issue
31.07(B) Admission of Negligence Only—Causation and Damage Still at Issue
31.08 Life Insurance Policy
31.09 Insurance Policy on Property
31.10 Uninsured Motor Vehicle—General Comment [Withdrawn 2012]
31.11 Uninsured Motor Vehicle—Insurer Only Defendant [Withdrawn 2012]
31.12 Uninsured Motor Vehicle—Insurer and Uninsured Driver Joined [Withdrawn 2012]
31.13 Uninsured Motor Vehicle—Hit-and-Run Vehicle [Withdrawn 2012]
31.14 Commitment for Mental Illness
31.15 Inherently Dangerous Activity—Liability of Employer of Independent Contractor
31.16 Waiver of Sovereign Immunity—Dangerous Condition of Public Entity's Property—Actual or Constructive Notice
31.17 Waiver of Sovereign Immunity—Dangerous Condition of Public Entity's Property Created by Employee
31.18 Paternity Actions—No Statutory Presumption
31.19 Paternity Actions—Statutory Presumption
31.20 Paternity Actions—Rebuttal of Statutory Presumption
31.21 Partial Invalidity of Will Due to Fraud [Withdrawn 2012]

31.22 Partial Invalidity of Will Due to Undue Influence [Withdrawn 2012]
31.23 Negligent Infliction of Emotional Distress
31.24 Employment Discrimination—Missouri Human Rights Act [Withdrawn 2012]
31.25 Lawful Justification—Employment Discrimination—Missouri Human Rights Act [Withdrawn 2012]
31.26 Negligent Misrepresentation—Pecuniary Loss
31.27 Wrongful Discharge in Violation of Public Policy [Withdrawn 2012]

Research References

West's Key Number Digest

Damages 🔑210(1), 216(1); Eminent Domain 🔑222(5); Explosives 🔑6 to 12; Insurance 🔑2811, 3579; Labor and Employment 🔑140(3); Mental Health 🔑7; Negligence 🔑305, 1720, 1723; Parent and Child 🔑205(1), 205(2), 229; Products Liability 🔑423; Wills 🔑332, 333

A.L.R. Library

A.L.R. Index, Eminent Domain; Instructions to Jury; Paternity; Products Liability; Res Ipsa Loquitur; Uninsured Motorists

West's A.L.R. Digest, Damages 🔑210(1), 216(1); Eminent Domain 🔑222(5); Explosives 🔑6 to 12; Insurance 🔑2811, 3579; Labor and Employment 🔑140(3); Mental Health 🔑7; Negligence 🔑305, 1720, 1723; Parent and Child 🔑205(1), 205(2), 229; Products Liability 🔑423; Wills 🔑332, 333

Legal Encyclopedias

C.J.S., Eminent Domain § 370; Employer-Employee Relationship § 91; Explosives § 89; Mental Health § 268

31.00 [2011 New] General Negligence—Single Negligent Act Submitted

Your verdict must be for plaintiff[1] if you believe:

First, defendant *(here insert an act or omission consistent with the theory of general negligence)*, and

Second, defendant was thereby negligent,[2] and

Third, as a direct result of such negligence[2] plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (2011 New)

1. See MAI 17.02 for the format for submission of multiple negligent acts or omissions. In any case involving more than one plaintiff or defendant, any reference to a particular party should include the name of that party, or other descriptive term. Where plaintiff submits against more than one defendant in separate verdict directors, the first line of the verdict director should be modified to indicate the particular defendant covered by this verdict director, i.e.:

> Your verdict must be for plaintiff against defendant John Jones if you believe:

If the verdict director is applicable to the plaintiff's claim against more than one defendant, it can be described as follows:

> Your verdict must be for plaintiff *[against both defendants] [against defendant John Jones and defendant Ace Trucking Lines]* if you believe:

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. For modification of verdict directing instructions to submit comparative fault, see MAI 37.01.

Committee Comment (2017 Revision)

A. Where agency is in issue, see MAI 18.01.

B. Where suit involves multiple causes of damages, see MAI 19.01.

C. Where suit is for wrongful death, see MAI 20.01 and MAI 20.02.

D. Where suit is for loss of services or medical expense of dependent, see MAI 31.04.

E. The "general negligence" theory has been the subject of several cases and should not be confused with a "premises liability" theory. For submission of a premises liability case, see Chapter 22. The "general negligence" theory is premised on basic negligence principles of duty, breach of duty, and injury proximately caused by the breach of duty. In a "general negligence" case, allegations are directed to the acts or omissions of the defendant and not to a possessor's liability for the condition of premises. See *Smith v. Dewitt and Associates, Inc.*, 279 S.W.3d 220 (Mo.App. S.D. 2009) (worker delivered cabinets to job site and fell from third floor guardrail, which collapsed due to alleged removal and reinstallation of rail by subcontractor using same nail holes); *Cossey v. Air Systems International, Inc.*, 273 S.W.3d 588 (Mo.App. E.D. 2009) (bulk petroleum storage operator undertook but failed to ground and drain a tank in preparation for repair and relining of the tank by an independent contractor); *Richey v. Philipp*, 259 S.W.3d 1 (Mo.App. W.D. 2008) (insurance agent told insured that homeowner's insurance did not cover removal of tree limb from roof, and homeowner's brother fell from roof attempting to remove limb); *Griffith v. Dominic*, 254 S.W.3d 195 (Mo.App. S.D. 2008) (independent contractor working at abbey injured when a monk attempted to assist with moving drywall but caused dry wall to fall on contractor); *Daoukas v. City of St. Louis*, 228 S.W.3d 30 (Mo.App. E.D. 2007) (airport electrician had responsibility to de-energize electrical cabinets, failed to do so, and affirmatively dismantled interlock safety system, causing severe injuries to independent contractor working on cabinets); *Nagaragadde v. Pandurangi*, 216 S.W.3d 241 (Mo.App. W.D. 2007) (homeowner failed to extinguish ceremonial lamp burning in basement prayer area causing guest's sari to catch fire); *Woodall v. Christian Hospital NE-NW*, 473 S.W.3d 649 (Mo.App. E.D. 2015) (railing removed by defendant's employee submitted under general negligence as opposed to premises liability).

Research References

West's Key Number Digest
Negligence ⚷1720

31.01 [1978 Withdrawn] Negligently Furnishing Dangerous Instrumentality or Product

Historical Note

(MAI 31.01 was withdrawn, revised, and renumbered MAI 25.06. MAI 25.06 was withdrawn in 1990. See MAI 25.09, 25.10(A) and 25.10(B)).

31.02(1) [1997 Revision] Res Ipsa Loquitur—Pedestrian

Your verdict must be for plaintiff if you believe:

First, defendant was the driver of the automobile, and

Second, the automobile left the street and ran across the sidewalk, and

Third, from the fact of such occurrence and the reasonable inferences therefrom, such occurrence was directly caused by defendant's negligence[1], and

Fourth, as a direct result of such negligence[1], plaintiff sustained damage.

Notes On Use (1997 Revision)

1. The terms "negligent" and "negligence" must be defined. See Definitions in Chapter 11.00.

For cases where joint control is in issue, see Notes on Use under MAI 31.02(3).

Committee Comment (2012 Revision)

A. See Committee Comment to MAI 31.02(3) for further discussion of the doctrine of "res ipsa loquitur."

B. In those rare cases where a complete affirmative defense may be submissible in a res ipsa loquitur case, an affirmative defense tail such as that shown in brackets at the end of MAI 17. 01 must be added to this instruction. See *Cannamore v. Bi-State Development Agency*, 469 S.W.2d 664 (Mo.App. 1971), reversed on other ground, 484 S.W.2d 308 (Mo.banc 1972) and *Lawley v. Kansas City*, 516 S.W.2d 829, 835 (Mo.App. 1974).

C. Where agency is in issue, see MAI 18.01.

D. Where suit involves multiple causes of damage, see MAI 19.01.

E. Where suit is for loss of services or medical expenses of dependent, see MAI 31.04.

Research References

West's Key Number Digest
Negligence ⚷1723

Annotations

In general 1
Defining negligence 3
Modification 2

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1. In general

Where defendant drove off the roadway, struck a culvert and then veered back onto the roadway, and struck plaintiff on wrong side of the road, plaintiff's case should have been submitted by MAI 17.13, wrong side of the road, rather than by MAI 31.02(1), res ipsa loquitur. *Dwyer v. Moss*, 462 S.W.2d 645 (Mo.banc 1971).

MAI 26.02 [Now 31.02] not an unconstitutional change in rules of evidence. *Stemme v. Siedhoff*, 427 S.W.2d 461 (Mo. 1968).

Error to combine general negligence (driving off road) with specific negligence (failure to keep a lookout). *Skiles v. Schlake*, 421 S.W.2d 244 (Mo. 1967).

Where passenger's case was tried on theory that bus driver negligently failed to keep a lookout for a depression, MAI 17.05 was appropriate, and it was error to submit plaintiff's case on a modified MAI 17.01 to 26.02(1) [Now 31.02] hypothesizing driver negligently drove into the depression. The instruction given would unduly extend the res ipsa doctrine. *Routt v. Bi-State Transit Development Agency*, 423 S.W.2d 202 (Mo.App. 1967).

2. Modification

In res ipsa action by tenant against landlord for injuries from leaking hot water pipe, it was unnecessary, although harmless, to further hypothesize the elements of defendant's superior knowledge and the unlikelihood of the occurrence if defendant had used due care; under the evidence in this case those two elements were for the court to determine, not the jury. *Niman v. Plaza House, Inc.*, 471 S.W.2d 207 (Mo.banc 1971).

Plaintiff passenger's verdict director submitting modified MAI 26.02(1)?[Now 31.02(1)] (driving off highway). *Stemme v. Siedhoff*, 427 S.W.2d 461, 463–4 (Mo. 1968).

Res ipsa submission proper where plaintiff ran into defendant's car after defendant left the highway, returned, and stopped in plaintiff's path. *Scott v. Club Exchange Corp.*, 560 S.W.2d 289 (Mo.App. 1977).

Proper res ipsa instruction in workman's action against city where heavy object slipped from sling affixed by other employees. *Lawley v. Kansas City*, 516 S.W.2d 829 (Mo.App. 1974).

Where defendant's car *skidded* off the wrong side of the highway, plaintiff was entitled to a res ipsa verdict director. *Silver v. Curtis*, 490 S.W.2d 412 (Mo.App. 1972).

Proper modification of res ipsa verdict director suggested in customer's action against beautician. *Epps v. Ragsdale*, 429 S.W.2d 798 (Mo.App. E.D. 1968).

3. Defining negligence

Defining the term "negligence" used in a res ipsa verdict director was mandatory. *Cunningham v. Hayes*, 463 S.W.2d 555 (Mo.App. 1971).

31.02(2) [1997 Revision] Res Ipsa Loquitur—Bus Passenger

Your verdict must be for plaintiff if you believe:

First, defendant was the [driver] [operator][1] of the bus, and

Second, the bus made a sudden and unusual [stop] [swerve] [jerk] [lurch][1] and

Third, from the fact of such occurrence and the reasonable inferences therefrom, such occurrence was directly caused by defendant's negligence[2], and

Fourth, as a direct result of such negligence[2], plaintiff sustained damage.

Notes on Use (1997 Revision)

1. Select the appropriate term.

2. The terms negligent and "negligence" must be defined. See Definitions in Chapter 11.00. For cases where joint control is in issue see Notes on Use under MAI 31.02(3).

Committee Comment (2012 Revision)

A. See Committee Comment to MAI 31.02(3) for further discussion of the doctrine of "res ipsa loquitur."

B. In those rare cases where a complete affirmative defense may be submissible in a res ipsa loquitur case, an affirmative defense tail such as that shown in brackets at the end of MAI 17. 01 must be added to this-instruction. *See Cannamore v. Bi-State Development Agency*, 469 S.W.2d 664 (Mo.App. 1971), reversed on other ground, 484 S.W.2d 308 (Mo.banc 1972); *Lawley v. Kansas City*, 516 S.W.2d 829, 835 (Mo.App. 1974).

C. Where agency is in issue, see MAI 18.01.

D. Where suit involves multiple causes of damage, see MAI 19.01.

E. Where suit is for loss of services or medical expenses of dependent, see MAI 31.04.

Research References

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Annotations

In general 1
Conversing 5
Defining negligence 3
Evidentiary support 2
Modification 4

1. In general

Plaintiff guest-passenger properly submitted res ipsa loquitur against host driver and primary negligence against road contractor. *Morris v. Israel Bros.*, 510 S.W.2d 437 (Mo. 1974).

Error to submit on res ipsa (MAI 26.02(2) [Now 31.02(2)]) against two defendants when each is in control of a separate instrumentality. *Willis v. Terminal Railroad Ass'n of St. Louis*, 421 S.W.2d 220 (Mo. 1967).

Use of MAI 26.02(2) [Now 31.02(2)], Res Ipsa Verdict Director, held mandatory; follows substantive law of *McCloskey v. Koplar*, 329 Mo. 527, 46 S.W.2d 557 (1932). (Instruction properly omits statement by court that facts warrant an inference of negligence.) *Brown v. Bryan*, 419 S.W.2d 62 (Mo. 1967).

Instruction in suit against bus company that driver "operated the bus before plaintiff was seated" was a roving commission and did not adequately describe the act of neglect on the part of the driver. *Spring v. Kansas City Area Transportation Authority*, 813 S.W.2d 386 (Mo.App. W.D. 1991).

2. Evidentiary support

Evidence supported submission of "sudden and unusual jerk" although witnesses did not use those precise words in describing the occurrence. *Dennis v. Sears, Roebuck & Co.*, 461 S.W.2d 325 (Mo.App. 1970).

3. Defining negligence

Defining the term "negligence" used in a res ipsa verdict director was mandatory. *Cunningham v. Hayes*, 463 S.W.2d 555 (Mo.App. 1971).

4. Modification

In res ipsa action by tenant against landlord for injuries from leaking hot water pipe, it was unnecessary, although harmless, to further hypothesize the elements of defendant's superior knowledge and the unlikelihood of the occurrence if defendant had used due care; under the evidence in this case those two elements were for the court to determine, not the jury. *Niman v. Plaza House, Inc.*, 471 S.W.2d 207 (Mo.banc 1971).

Res ipsa loquitur properly applied in fire case where defendant had control and superior knowledge of combustible materials. *Cohen v. Archibald Plumbing & Heating Co.*, 555 S.W.2d 676 (Mo.App. 1977).

Personal injury action for damage to ear by explosive sound from telephone properly submitted by modified MAI 31.02(2). Instrumental control properly described by phrase that defendant was "operator of the telephone system." *McDowell v. Southwestern Bell Tel. Co.*, 546 S.W.2d 160 (Mo.App. 1976).

Proper res ipsa instruction in workman's action against city where heavy object slipped from sling affixed by other employees. *Lawley v. Kansas City*, 516 S.W.2d 829 (Mo.App. 1974).

5. Conversing

Plaintiff's res ipsa submission required jury first to believe bus made a sudden stop *and* second, to believe such movement was the result of defendant's negligence. Defendant's converse directed a verdict if the jury did not believe both those two hypotheses. The jury could not disbelieve the first and also disbelieve the second, but the trial court improperly granted plaintiff a new trial on the ground the converse was confusing since it was not prejudicial to plaintiff. *Wims v. Bi-State Development Agency*, 484 S.W.2d 323 (Mo.banc 1972).

Defendant may *disjunctively* converse two elements of plaintiff's res ipsa verdict director i.e., the sudden jerk and negligent causation. *Sabbath v. Marcella Cab Co.*, 536 S.W.2d 939 (Mo.App. 1976).

31.02(3) [1997 Revision] Res Ipsa Loquitur—General

Your verdict must be for plaintiff if you believe:

First, defendant *(here describe defendant's control, right to control, or management of the instrumentality involved)*, and

Second, *(here describe the occurrence, event or incident, which is alleged to be the type that does not ordinarily happen when those in charge use due care)*, and

Third, from the fact of such occurrence and the reasonable inferences therefrom, such occurrence was directly caused by defendant's negligence[1], and

Fourth, as a direct result of such negligence[1], plaintiff sustained damage.

Notes On Use (1997 Revision)

1. The terms "negligent" and "negligence" must be defined. *See* Definitions in Chapter 11.00.

The res ipsa loquitur doctrine can be applicable to those in joint control, or with joint right of control (e.g. landlords and tenants or contractors doing work on landowner's property). However, these submissions will be on different factual theories. *See McGowen v. Tri-County Gas Co.*, 483 S.W.2d 1 (Mo. 1972); *Barb v. F.I.E.*, 281 S.W.2d 297, 303 (Mo. 1955); *Bone v. G.M.C.*, 322 S.W.2d 916, 921 (Mo. 1959); *Kelly v. Laclede Real Estate & Inv. Co.*, 348 Mo. 407, 155 S.W.2d 90, 96 (1941). In such cases, the res ipsa loquitur general instruction may be used to submit the appropriate factual theory against each of the defendants in separate verdict directing instructions with Paragraph Fourth modified in accordance with MAI 19.01.

Committee Comment (1997 Revision)

A. In *Martin v. City of Washington*, 848 S.W.2d 487, 495 (Mo.banc 1993), the Supreme Court states:

> Res ipsa loquitur is a rule of evidence that permits the jury to infer negligence without direct proof. *Frazier v. Ford Motor Co.*, 365 Mo. 62, 276 S.W.2d 95, 98 (Mo.banc 1955). The doctrine supplies circumstantial evidence of a breach when the plaintiff lacks the facts to plead the specific negligent conduct that constituted the breach. In effect, res ipsa loquitur carries

the plaintiff over the breach hurdle. It cannot, however, leap over the causation hurdle.

B. In *Cremeens v. Kree Institute of Electrolysis*, 689 S.W.2d 839, 842 (Mo.App. E.D. 1985), the Court of Appeals held that the doctrine of res ipsa loquitur applies when (a) the instrumentality involved was under the management and control of the defendant; (b) the defendant possesses a superior knowledge or means of information as to the cause of the occurrence; and (c) the occurrence resulting in injury was such as does not ordinarily happen if those in charge use due care. In *Cremeens, Id.* at 842, the court also stated that the third element is a question of law since it is a judicial function to determine whether a certain set of circumstances does, as a matter of law, permit the inference of negligence. *See also, Epps v. Ragsdale*, 429 S.W.2d 798, 800 (Mo.App. E.D. 1968).

C. In *Niman v. Plaza House, Inc.*, 471 S.W.2d 207, 213 (Mo. 1971); the supreme court stated that the issues of defendant's superior knowledge, and that the occurrence does not usually happen in the absence of negligence, need not be submitted to the jury. The presence of two defendants does not preclude the use of res ipsa loquitur, so long as on the facts of the case, the jury could reasonably find that either or both of the defendants were in control of the instrumentality, so as to make the application of res ipsa loquitur proper. *Bass v. Nooney Co.*, 646 S.W.2d 765, 768 (Mo.banc 1983).

D. In those rare cases where a complete affirmative defense may be submissible in a res ipsa loquitur case, an affirmative defense tail such as that shown in brackets at the end of MAI 17.01 must be added to this instruction. *See Cannamore v. Bi-State Development Agency*, 469 S.W.2d 664 (Mo.App. 1971), rev'd on other ground, 484 S.W.2d 308 (Mo.banc 1972); *Lawley v. Kansas City*, 516 S.W.2d 829, 835 (Mo.App. 1974).

E. Where agency is in issue, see MAI 18.01.

F. Where suit involves multiple causes of damage, see MAI 19.01.

G. Where suit is for loss of services or medical expenses of dependent, see MAI 31.04.

H. For medical malpractice cases in which the doctrine of res ipsa loquitur is applicable, see *Sides v. St. Anthony's Medical Ctr*, 258 S.W.3d 811 (Mo.banc 2008), and MAI Chapter 21.

Research References

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Annotations

1. In general

Standard res ipsa loquitur instruction, although appropriately used for bailment actions, is not necessarily a "bailment" instruction and is properly used in negligence cases. *Jungerman v. City of Raytown*, 925 S.W.2d 202 (Mo.banc 1996).

MAI 31.02(3), although appropriately used for bailment actions, is not necessarily a "bailment" instruction; rather, it is a general res ipsa loquitur instruction that is properly used in negligence cases with facts fitting the MAI 31.02(3) pattern. *Jungerman v. City of Raytown*, 925 S.W.2d 202 (Mo.banc 1996).

Verdict directing instruction combining MAI 31.11 (UM) with MAI 31.02(3) (Res Ipsa Loquitur) approved. *Hale v. American Family Mut. Ins. Co.*, 927 S.W.2d 522 (Mo.App. W.D. 1996).

Jury instruction term "occurrence" was sufficiently described where there was only one relevant, compensable event involved and occurrence referenced an automobile accident which was sufficiently described elsewhere in same instruction. *Hansen v. James*, 847 S.W.2d 476 (Mo.App. W.D. 1992).

Instruction in negligence action arising out of incident in which parked car rolled down hill into building was not defective for failing to correctly hypothesize element of control and element of superior knowledge required for submission on res ipsa loquitur; facts hypothesized in instruction supported inference that defendant had the right to control and, in fact, did control the automobile, and other facts hypothesized in instruction described an occurrence of the type which does not ordinarily happen when those in charge use due care. *Housing Auth. of City of Rolla v. Kimmel*, 771 S.W.2d 932, 939 (Mo.App. S.D. 1989).

MAI 31.02(3) approved and not subject to attack on the basis that it does not correctly hypothesize the elements of control or superior knowledge. *Housing Authority of City of Rolla v. Kimmel*, 771 S.W.2d 932 (Mo.App. S.D. 1989).

Res ipsa loquitur instruction was proper in personal injury action, even though it did not require defendant to have exclusive control of instrumentality. *Johnson v. National Super Markets, Inc.*, 752 S.W.2d 809, 814 (Mo.App. E.D. 1988).

Error to submit instruction on punitive damages, where plaintiff's general negligence claim was based upon res ipsa loquitur, which did not require jury to find any specific negligent conduct. *Johnson v. National Super Markets, Inc.*, 710 S.W.2d 455 (Mo.App. E.D. 1986).

Error to refuse proper res ipsa instruction and give instead a not-in-MAI lack of control instruction. *Sams v. Green*, 591 S.W.2d 15 (Mo.App. E.D. 1979).

31.03 [1981 Revision] Explosives

Your verdict must be for plaintiff if you believe:

First, defendant intentionally[1] exploded *(describe explosive such as dynamite)*, and

Second, as a direct result of such explosion plaintiff was damaged.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1981 Revision)

1. Omit the word "intentionally" if this matter is not in issue.

* Add if affirmative defense is submitted.

Committee Comment (1996 Revision)

A. In *Summers v. Tavern Rock Sand Co.*, 315 S.W.2d 201, 203 (Mo. 1958), the Court said:

> In this state "blasting is regarded as a work which one may lawfully do, providing he avoids injuring persons or property, and subject to his obligation to pay damages for any injury inflicted by his blasting." *Schaefer v. Frazier-Davis Const. Co., Mo.App.*, 125 S.W.2d 897. And in this state when damage to property is by vibration or concussion from blasting there is an invasion of the premises and liability irrespective of negligence quite as if the blasting had cast rocks or debris thereon.

B. See Restatement (Second) of Torts §§ 519 and 520 (1965).

Research References

West's Key Number Digest
Explosives ⚷6 to 12

Legal Encyclopedias
C.J.S., Explosives § 89

Annotations

1. Intention

Where defendant's *intention* to explode dynamite was not in dispute but plaintiffs included that element in their verdict director they assumed an unnecessary, harmless burden. *Donnell v. Vigus Quarries*, 526 S.W.2d 314 (Mo.App. 1975).

31.04 [1991 Revision] Loss of Consortium, Loss of Services or Medical Expenses—Spouse or Child Injured—For EITHER Comparative Fault or Non-Comparative Fault Submissions

If you [find in favor of plaintiff *(name of plaintiff with primary claim)* on [his] [her][1] claim for personal injuries][2] [assess a percentage of fault to [any][3] defendant][4] and if you believe that plaintiff *(name of plaintiff with derivative claim)* sustained damage as a direct result of injury to [his] [her] [husband] [wife] [child][1] then in your verdict you must find that plaintiff *(name of plaintiff with derivative claim)* did sustain such damage.

Notes on Use (1991 New)

1. Select appropriate word(s).

2. Use this bracketed phrase in a non-comparative fault case.

3. Insert if more than one defendant.

4. Use this bracketed phrase in a comparative fault case.

Committee Comment (1991 New)

A. This verdict directing instruction is for use in submitting a derivative claim for loss of consortium, loss of services or medical expenses on behalf of a spouse or a child where the derivative claim is joined in the same lawsuit with the primary claim. In such a situation, the jury determines negligence issues under the verdict directing instruction submitting the primary claim and the only additional element which needs to be decided on the derivative claim is whether the spouse (or parent) sustained damage due to injury to the injured spouse (or child).

B. *See* MAI 4.18 for the damage instruction to be used in conjunction with this instruction in a non-comparative fault case and MAI 37.08 for the damage instruction to be used with this instruction in a comparative fault case. See MAI 36.23 and MAI 37.09 for the appropriate verdict for non-comparative fault and comparative fault cases respectively.

C. In the rare case in which the derivative claim is tried separately (primary claim not joined), the verdict directing instruction will need all elements of negligence and damage. Thus, if MAI 17.01 is used in such a non-comparative fault case, the verdict directing instruction would read as follows:

> Your verdict must be for plaintiff *(name of plaintiff with derivative claim)* if you believe:
>
> First, defendant violated the traffic signal, and
>
> Second, defendant was thereby negligent,[1] and
>
> Third, as a direct result of such negligence,[1] plaintiff's [husband] [wife] [child][2] was injured and plaintiff thereby sustained damage.

Notes on Use

1. Where the term "negligent" or "negligence" is used, it must be defined. *See* Chapter 11.00.

2. Select the appropriate term.

D. A similar instruction, modified for a comparative fault case, should be given in a comparative fault case in which the derivative claim is tried without joinder of the primary claim. See Chapter 37.00 for the modifications necessary to submit comparative fault.

Research References

West's Key Number Digest
Damages ⚷216(1)

Annotations

In general 1
Form of verdict 2

1. In general

The Missouri Supreme Court refused to recognize a cause of action for loss of parental consortium (consortium action by child due to injury to parent) or filial consortium (consortium action by sibling due to injury to another sibling). *Powell v. American Motors Corp.*, 834 S.W.2d 184 (Mo.banc 1992).

In consortium case it was prejudicially erroneous to omit "thereby" from damage clause. *Joly v. Wippler*, 449 S.W.2d 565 (Mo. 1970).

Spouse is not entitled to judgment on claim for loss of consortium merely because injured spouse was found entitled to recover. Consortium claimant is not entitled to nominal damages. *Lear v. Norfolk & Western Ry. Co.*, 815 S.W.2d 12 (Mo.App. W.D. 1991).

In consortium damage instruction use of "thereby" as in MAI 31.04 instead of "as the direct result of such injury" as in MAI's 35.05 and 35.06 not error. *Penn v. Columbia Asphalt Co.*, 513 S.W.2d 679 (Mo.App. 1974).

Where husband and wife joined in action for his injuries and her loss of consortium, it was error to submit verdict director without adding the damage-to-wife clause of MAI 26.04 [Now 31.04] (consortium damage); prejudice presumed. *Robben v. Peters*, 427 S.W.2d 753 (Mo.App. 1968).

2. Form of verdict

Where there was undisputed evidence of a wife's loss of consortium and jury found for injured husband but against wife, the verdict against her was void for inconsistency. *Foster v. Rosetta*, 443 S.W.2d 183 (Mo. 1969).

31.05 [2008 Withdrawn] Eminent Domain

Historical Note

(MAI 31.05 (1981 Revision) and its related Notes on Use have been withdrawn. All instructions and illustrations relating to Eminent Domain have been collected in Chapter 9 of MAI – Civil. MAI 31.05 has been replaced by MAI 9.04 (2008 Revision)).

31.06 [2012 Withdrawn] Will Contest

Historical Note

(MAI 31.06 and its related Notes on Use and Committee Comment have been withdrawn. All instructions and illustrations related to Will Contests have been collected in Chapter 15 of MAI—Civil. MAI 31.06 has been replaced by MAI 15.04 (2012 Revision)).

31.07 [2016 Withdrawn] Amount of Damages Only Issue

Historical Note

(MAI 31.07 and its related Notes on Use have been withdrawn. MAI 31.07(A) and MAI 31.07(B) replace the prior MAI 31.07).

31.07(A) [2016 New] Admission of Liability—Amount of Damages Only Issue

As a result of defendant's admission of liability, the only issue for you to decide is the amount of damages. Therefore, in your verdict you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][1] that defendant's conduct directly caused or directly contributed to cause.

Notes on Use (2016 New)

1. This may be added if supported by the evidence.

This instruction is a combination of a verdict directing instruction and a damage instruction in a negligence case. There is no need for a separate damage instruction. This instruction should be used only in those cases where defendant admits liability (which concedes negligence and the existence of resulting damage) and the only issue is the amount of damages. This instruction is not applicable where defendant claims there was no damage.

The applicable verdict form is as follows:

VERDICT

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* at $ ____ *(stating the amount).*

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________

If property damage is involved, modify appropriately. See MAI 36. 02.

Where a defendant concedes only negligence, as opposed to admitting liability, see MAI 31.07(B).

Committee Comment (2016 New)

A. A party is not required to accept a judicial admission of liability of an adversary, but may insist on presenting evidence to prove liability. *Cogdill v. Flanagan*, 410 S.W.3d 714 (Mo.App. S.D. 2013); *Ruppel v. Clayes*, 72 S.W.2d 833 (Mo.App. E.D. 1934); *Ingram v. Rinehart*, 108 S.W.3d 783 (Mo.App. W.D. 2003).

B. This format can be used for other types of cases where liability is admitted. Modifications may be necessary depending upon the applicable damage instruction. The concepts employed for this simple negligence example may be adapted for other causes of action.

Research References

West's Key Number Digest
Damages ⚷210(1)

Annotations

In general 1

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1. In general

MAI 31.07(A) is the proper instruction where there has been an interlocutory judgment on the merits establishing liability and the only issue before the jury is the amount of damages. *Estate of Overbey by Overbey v. Franklin*, 558 S.W.3d 564 (Mo.App. W.D. 2018).

31.07(B) [2016 New] Admission of Negligence Only—Causation and Damage Still at Issue

Your verdict must be for plaintiff if you believe the defendant's conduct directly caused or directly contributed to cause damage to plaintiff.

Notes on Use (2016 New)

In a case where defendant admits negligence, but disputes causation and/or damage, use this instruction. Where a defendant admits liability, as opposed to conceding only negligence, see MAI 31.07(A).

A separate damage instruction must be given. See MAI 4.01.

Select the appropriate verdict form from Chapter 36.

See *Copeland v. Compton*, 914 S.W.2d 378 (Mo.App. S.D. 1996), for a discussion of the difference between an admission of negligence and an admission of liability. See also, *Lauber v. Buck*, 615 S.W.2d 89 (Mo.App. E.D. 1981).

Committee Comment (2016 New)

A. A party is not required to accept a judicial admission of liability of an adversary, but may insist on presenting evidence to prove liability. *Cogdill v. Flanagan*, 410 S.W.3d 714 (Mo.App. S.D. 2013); *Ruppel v. Clayes*, 72 S.W.2d 833 (Mo.App. E.D. 1934); *Ingram v. Rinehart*, 108 S.W.3d 783 (Mo.App. W.D. 2003).

Research References

West's Key Number Digest
Damages ⚷210(1)

31.08 [1978 Revision] Life Insurance Policy

Your verdict must be for plaintiff if you believe:

First, defendant issued its policy of life insurance to *(insert name of decedent)*, and

Second, the policy was in force on *(the date of death)* when *(insert name of decedent)* died, and

Third, plaintiff then was the beneficiary of the policy. [and][1]

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (1978 Revision)

1. In those cases where there is an issue involving proof of a material fact which is an essential element of the plaintiff's case (for example, an issue as to whether a death resulted from accidental means when the policy covers only accidental death) a paragraph requiring a finding on such material fact must be added, e.g.,

> "Fourth, the death of *(insert name of decedent)* was *(here insert policy condition, such as 'a result of accidental means')*."

* Add if affirmative defense is submitted. For example, MAI 32.24.

Research References

West's Key Number Digest
Insurance ⚷3579

Annotations

In general 1
Definitions 2

1. In general

In case on insurance policy, the cause of damage was a factual issue and it was error to submit an hypothesis that "plaintiff sustained a loss within the terms of the policy." That was a legal question and the instruction was a roving commission. *Esmar v. Zurich, Ins. Co.*, 485 S.W.2d 417 (Mo. 1972).

In action on accident insurance policy, plaintiff's verdict director erroneously hypothesized . . . [T]he activity engaged in by plaintiff was within the terms of the policy since that submitted a question of law. *Crawford v. Mid-America Ins. Co.*, 488 S.W.2d 255 (Mo.App. 1972).

2. Definitions

Because accidental death policy term, "to the exclusion of all other causes," has meaning in law different than it has in common parlance, its legal meaning should be defined to jury. *Brock v. Firemens Fund of America Ins. Co.*, 637 S.W.2d 824 (Mo.App. E.D. 1982).

In suit on accidental death policy, the term "course of employment" as used in instruction defining "non-occupational injury" was plain and unambiguous and the jury needed no instruction to define it. *Brock v. Firemens Fund of America Ins. Co.*, 637 S.W.2d 824 (Mo.App. E.D. 1982).

31.09 [1978 New] Insurance Policy on Property

Your verdict must be for plaintiff if you believe:

First, defendant issued its policy to plaintiff on *(here describe property)* covering loss due to *(here describe applicable coverage, e.g., fire, collision, or windstorm)*, and

Second, such property was damaged by *(here insert applicable coverage)*, and

Third, the policy was in force on the date of such loss.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1978 New)

* Add if affirmative defense is submitted. For example, MAI 32.24.

Research References

West's Key Number Digest
Insurance 🔑3579

Annotations

1. In general

Insurer bears burden of proof on issue of prejudice from insured's failure to comply with policy condition such as duty to cooperate and submit to examination under oath. *Nichols v. Preferred Risk Group*, 44 S.W.3d 886 (Mo.App. S.D. 2001).

To recover under fire insurance policy, claimant must establish (1) that insurance company issued its policy to claimant on property covering loss from fire; (2) that such property was damaged by fire; and (3) that policy was in force on date of fire. *Travers v. Universal Fire & Cas. Ins. Co.*, 34 S.W.3d 156 (Mo.App. W.D. 2000).

In referring to language used in an instruction patterned after MAI 31.09, the Court held that the words "all" and "risks" need not be defined. *Missouri Commercial Inv. v. Employers Mut. Cas.*, 680 S.W.2d 397 (Mo.App. E.D. 1984).

In referring to language used in an instruction patterned after MAI 31.09, the Court held that the words "all" and "risks" need not be defined. *Missouri Commercial Inv. v. Employers Mut. Cas.*, 680 S.W.2d 397 (Mo.App. E.D. 1984).

Where an insured's recovery depends upon proof that he had an insurable interest, these facts must be submitted in the verdict directing instruction even though they are not specifically set out in the model MAI instruction. *Glover v. Missouri Property Ins. Placement*, 676 S.W.2d 66 (Mo.App. E.D. 1984).

Plaintiffs' verdict director, by failing to submit to the jury the issue of ownership, patently assumed a highly controverted issue of fact permeating the entire case and for this reason was inherently prejudicial. *Duncan v. Andrew County Mut. Ins. Co.*, 665 S.W.2d 13 (Mo.App. W.D. 1983).

31.10 [2012 Withdrawn] Uninsured Motor Vehicle—General Comment

Historical Note

(MAI 31.10 (1978 Revision) has been withdrawn. All instructions relating to Uninsured Motor Vehicles has been collected in Chapter 12 of MAI—Civil. MAI 31.10 has been replaced by MAI 12.00 (2012 Revision)).

31.11 [2012 Withdrawn] Uninsured Motor Vehicle—Insurer Only Defendant

Historical Note

(MAI 31.11 (1996 Revision) and its related Notes on Use have been withdrawn. All instructions relating to Uninsured Motor Vehicles have been collected in Chapter 12 of MAI—Civil. MAI 31.11 has been replaced by MAI 12.03 (2012 Revision)).

31.12 [2012 Withdrawn] Uninsured Motor Vehicle—Insurer and Uninsured Driver Joined

Historical Note

(MAI 31.12 (1978 New) and its related Notes on Use have been withdrawn. All instructions relating to Uninsured Motor Vehicles have been collected in Chapter 12 of MAI—Civil. MAI 31.12 has been replaced by MAI 12.04 (2012 Revision)).

31.13 [2012 Withdrawn] Uninsured Motor Vehicle—Hit-and-Run Vehicle

Historical Note

(MAI 31.13 (1996 Revision) and its related Notes on Use have been withdrawn. All instructions relating to Uninsured Motor Vehicles have been collected in Chapter 12 of MAI—Civil. MAI 31.13 has been replaced by MAI 12.05 (2012 Revision)).

31.14 [2000 Revision] Commitment for Mental Illness

Your verdict must be that respondent should be detained for treatment if you believe:

First, respondent is mentally ill,[1] and

Second, as a result of such mental illness,[1] respondent presents a substantial risk of serious physical harm to [respondent] [others].[2]

Notes on Use (2000 Revision)

1. The phrases "mentally ill" and "mental illness" must be defined. See definition in MAI 16.07.

2. Select the term supported by the evidence. If both are supported by the evidence, they may be submitted in the alternative.

Committee Comment (2000 Revision)

A. On hearings for commitment for treatment and extensions of commitments, there are three questions of fact that must be decided upon clear and convincing evidence:

1. Is the respondent mentally ill?
2. If so, as a result is the respondent likely to harm (her)himself or others?
3. Is there an agreeing, appropriate facility for (her)his treatment?

B. When a jury is called, the jury decides only the first two questions and, if both are found in the affirmative, the court must determine in the affirmative the third question of the availability of an appropriate consenting treatment facility before it can make its order of detention. § 632.350, RSMo.

C. See § 632.005(9), RSMo.

Research References

West's Key Number Digest
Mental Health ⚷7

Legal Encyclopedias
C.J.S., Mental Health § 268

31.15 [1992 New] Inherently Dangerous Activity—Liability of Employer of Independent Contractor

Your verdict must be for plaintiff and against *(state the name of the employer of the independent contractor)* if you believe:

First[1], *(here describe the allegedly inherently dangerous activity)* was an inherently dangerous activity[2], and

Second, during such activity, *(state the name of independent contractor)* either:

failed to *(here state the special precaution the independent contractor failed to take)*, or

failed to *(here insert alternative failure)*, and

Third, *(state the name of independent contractor)*, in one or more of the respects submitted in Paragraph Second, was thereby negligent[3], and

Fourth, such negligence[3] and the danger inherent in such activity combined to directly cause[4] damage to plaintiff.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (1992 New)

1. Where there is a dispute as to whether the allegedly inherently dangerous activity is in fact called for by the nature of the work to be performed under the contract, an additional paragraph must be inserted as Paragraph First and the remaining paragraphs should be renumbered. It is not clear under Missouri cases whether the "inherently dangerous activity" doctrine is formulated under Restatement of Torts or Restatement (Second) of Torts.

If Restatement of Torts applies, the additional paragraph that must be inserted as Paragraph First is as follows:

"the *(here describe the allegedly inherently dangerous activity)*

> was reasonably necessary to the performance of the work *(state the name of independent contractor)* was hired to do, and"

If Restatement (Second) of Torts applies, the additional paragraph that must be inserted as Paragraph First is as follows:

> "the *(here describe the allegedly inherently dangerous activity)* was reasonably likely during the performance of the work by *(state the name of independent contractor)*, and"

2. The term "inherently dangerous activity" must be defined. *See* MAI 16.08.

3. The terms "negligence" and "negligent" must be defined. See definition in Chapter 11.00.

4. Where applicable, this paragraph may be modified in accordance with MAI 19.01.

* Add if affirmative defense is submitted. This bracketed phrase should not be used to submit comparative fault. *See* MAI 37.01.

Committee Comment (2021 Revision)

A. In *Ballinger v. Gascosage Elec. Co-op.*, 788 S.W.2d 506 (Mo.banc 1990), the Court reviewed prior Missouri cases involving the "inherently dangerous activity" doctrine and set forth the elements necessary to support a claim against an employer of an independent contractor arising out of the performance of the activity by the independent contractor.

B. The "inherently dangerous activity" doctrine is limited in scope and the initial determination of whether the doctrine may apply to the activity in a particular case is for the Court. *Nance v. Leritz*, 785 S.W.2d 790 (Mo.App. E.D. 1990); *Sullivan v. St. Louis Station Associates*, 770 S.W.2d 352 (Mo.App. E.D. 1989); *Floyd v. Benson*, 753 S.W.2d 945 (Mo.App. S.D. 1988).

C. In *Zueck v. Oppenheimer Gateway Properties*, 809 S.W.2d 384 (Mo.banc 1991), the Court held:

> "We hold that the inherently dangerous exception no longer applies to employees of independent contractors covered by workers' compensation and overrule *Mallory v. Louisiana Pure Ice & Supply Co.*, 320 Mo. 95, 6 S.W.2d 617 (Mo.banc 1928) and cases following *Mallory*, including *Ballinger v. Gascosage Electric Cooperative*, 788 S.W.2d 506 (Mo.banc 1990), to the extent that those cases are inconsistent with this opinion."

D. In *Matteuzzi v. Columbus Partnership, L.P.*, 866 S.W.2d 128 (Mo.banc 1993), the Supreme Court held that *Zueck*, *supra*, applies not only to the vicarious liability of the landowner, but also to a direct negligence action against the landowner by the employee of an independent contractor engaged in an inherently dangerous activity. In *State ex rel. Anheuser-Busch v. Mummert*, 887 S.W.2d 736, 738 (Mo.App. E.D. 1994), the court stated:

> "To summarize, an employee of an independent contractor hired by a landowner to perform an inherently dangerous activity on landowner's property has no cause of action against the landowner for injuries sustained while performing such activity under either the vicarious liability theory or the direct negligence theory where the employee was covered by workers' compensation."

E. *See also* Restatement (Second) of Torts §§ 416 to 429.

F. Where suit involves multiple causes of damage, see MAI 19.01.

Research References

West's Key Number Digest
Negligence ⚷305

Annotations

In general 1
Scope of work 2

1. In general

To find a landowner liable for an independent contractor's actions, a jury must determine that the landowner hired the independent contractor to perform an inherently dangerous activity, the independent contractor was negligent in performing that activity, and the negligence caused damage to the plaintiff. *Syn, Inc. v. Beebe*, 200 S.W.3d 122 (Mo.App. W.D. 2006).

To hold a landowner liable for the independent contractor's negligence, the nature of the activity for which the independent contractor was hired must be clearly tied to the resulting damage. *Syn, Inc. v. Beebe*, 200 S.W.3d 122 (Mo.App. W.D. 2006).

Court erred in submitting instructions regarding mobile home owner's liability for actions of independent contractor that owner hired to repair gas furnace in action propane gas supplier brought against owner seeking contribution or indemnity on settlement supplier paid in wrongful death action resulting from explosion, where instructions deviated from MAI on employer liability and for negligence of independent contractors submitted instructions asked jury to determine what activities owner hired contractor to perform and that these activities were inherently dangerous only after jury had found that contractor was negligent. Thus, submitted instructions segregated the predicate finding of the scope and nature of the activity to another subsequent instruction and severed the requisite legal connections between the elements of the MAI instruction. *Syn, Inc. v. Beebe*, 200 S.W.3d 122 (Mo.App. W.D. 2006).

2. Scope of work

Jury instruction regarding scope of work independent contractor was hired by mobile home owner to perform and whether such work was inherently dangerous did not constitute a "roving commission" because it asked whether contractor was hired to "troubleshoot a gas leak" and "do whatever it took to find out what was wrong with the furnace at the mobile home," in action propane gas supplier brought against mobile home owner seeking contribution or indemnity on settlement supplier paid in wrongful death action resulting from explosion at mobile home that killed tenant, as the activities submitted were supported by the evidence and the activities as submitted were not so broad to be confusing. *Syn, Inc. v. Beebe*, 200 S.W.3d 122 (Mo.App. W.D. 2006).

31.16 [2021 Revision] Waiver of Sovereign Immunity—Dangerous Condition of Public Entity's Property—Actual or Constructive Notice

Your verdict must be for plaintiff if you believe[1, 2]:

First, *(here describe condition that made the public entity's property dangerous, such as "there was oil on the gymnasium floor" or "the table saw was unguarded")*, and as a result the defendant's *(describe property, such as "gymnasium floor" or "table saw")* was not reasonably safe, and

Second, defendant knew or by using ordinary care[3] could have known of this condition in time to [either] [remedy such condition] [warn of such condition] [make the condition reasonably safe][4], and

Third, defendant failed to use ordinary care[3] to [either] [remedy such condition] [warn of such condition] [make the condition reasonably safe][4], and

Fourth, as a direct result of such failure, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (2016 Revision)

1. Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01. For submission of plaintiff's comparative fault for failure to keep a careful lookout, see MAI 32.28.

2. If there is a factual dispute about the ownership or control of the property, add: "First, defendant (*identify the public entity*) either owned or controlled the (*describe the property, such as "sidewalk", "manhole", "drainage ditch")*, and . . .". Then renumber the other paragraphs of the verdict directing instruction. See *Walton v. City of Seneca*, 420 S.W.3d 640 (Mo.App. S.D. 2013); *Spielvogel v. City of Kansas City*, 302 S.W.3d 108 (Mo.App. W.D. 2009); *Thomas v. Clay County Election Board*, 261 S.W.3d 574 (Mo.App. W.D. 2008). Compare, *Randel v. City of Kansas City*, 467 S.W.3d 383 (Mo.App. W.D. 2015).

3. The phrase "ordinary care" must be defined. See definition at MAI 11.05.

4. If more than one phrase is used, they must be submitted in the disjunctive and each must be supported by the evidence. Other submissions of negligence, such as "barricade it", "remove it", or another appropriate submission, may also be proper if supported by the facts of the case.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. *See* MAI 37.01.

Committee Comment (2021 Revision)

A. This verdict directing instruction is for use in cases under § 537.600.1(2), RSMo, relating to a dangerous condition of property of which a public entity has actual or constructive notice. In cases in which the dangerous condition of the property is created by an employee of the public entity as described in § 537.600.1(2), see MAI 31.17.

B. Where suit involves multiple causes of damages, see MAI 19.01.

C. Where suit is for wrongful death, see MAI 20.01 and 20.02.

D. Where suit involves a dangerous condition on private land, see MAI 22.03.

E. Where suit is for loss of services or medical expenses of dependent, see MAI 31.04.

F. Where suit involves liability of an adjoining landowner for a dangerous condition created or enhanced by the adjoining landowner on a public sidewalk, see MAI 22.09.

G. The 1995 Revision to this instruction changed the phrase "should have known" to "could have known" on the issue of constructive notice. Some MAI instructions had used one of the phrases and other instructions had used the other phrase. Questions had arisen as to whether "should have known" imposed a higher burden than "could have known". See *Benton v. City of Rolla*, 872 S.W.2d 882 (Mo.App. S.D. 1994); *Burrell v. Mayfair-Lennox Hotels, Inc.*, 442 S.W.2d 47 (Mo. 1969). For consistency, the Committee has opted to use the phrase "could have known" to the extent possible in the context of constructive notice. Other instructions, such as MAI 10.07, Paragraph Second of MAI 22.01, MAI 22.07, and MAI 25.10(A), continue to use the phrase "should have known" because the phrase is part of a "knew or had reason to know" standard as explained in the Committee Comments to those instructions.

H. See *Rhodes v. Kandlbinder*, 557 S.W.3d 502 (Mo.App. E.D. 2018) for further discussion of submissions such as "remove it", "remedy", or "make the condition reasonably safe" where a "warning" is insufficient to relieve the possessor of premises from liability.

Research References

West's Key Number Digest
Negligence ⚷305

Annotations

In general 1
Deviation of verdict director from applicable pattern instruction 3
Proximate cause 2

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1. In general

Error in dismissing claims against city was harmless, where verdict directing instruction under MAI 31.16 given on remaining claim was practically identical to instructions under MAI 22.05 and 25.10(B), from which plaintiff would have been required to choose if other claims had not been dismissed, and jury returned verdict in city's favor; under circumstances, dismissal of those claims did not affect outcome of case. *Benton v. City of Rolla*, 872 S.W.2d 882 (Mo.App. S.D. 1994).

2. Proximate cause

Modification of MAI 31.16 from "as a direct result of such failure, plaintiff sustained damages," to "such failure directly caused or directly contributed to cause the fatal injury," was not misleading or prejudicial; change was due to comparative fault nature of wrongful death action by survivors of fatal automobile accident against Highway and Transportation Commission (MHTC). *Highway and Transportation Commission (MHTC). Linton v. Missouri Highway and Transp. Com'n*, 980 S.W.2d 4 (Mo.App. E.D. 1998).

3. Deviation of verdict director from applicable pattern instruction

In automobile accident victim's personal injury suit, county waived any objection to deviation of the verdict director from MAI which set forth the approved verdict director for cases alleging waiver of sovereign immunity due to dangerous condition of public property, where county's counsel specifically told trial court that he had no objections to the instructions that were being given and had no alternative versions of instructions to offer, even after being informed that any prior conversations in chambers had been off the record, and county offered a converse instruction that used language identical to that in the instruction to which it objected. *Hensley v. Jackson County*, 227 S.W.3d 491 (Mo.banc 2007).

In automobile accident victim's personal injury suit against county, deviation of the verdict director from MAI which set forth the approved verdict director for cases alleging waiver of sovereign immunity due to dangerous condition of public property, such that jury was required to find that "such failure directly caused or directly contributed to cause Plaintiff to sustain damage" rather than that "as a direct result of such failure, plaintiff sustained damage," did not rise to level of plain error, in the absence of a showing that the variation in the language used caused manifest injustice or a miscarriage of justice. *Hensley v. Jackson County*, 227 S.W.3d 491 (Mo.banc 2007).

31.17 [1992 New] Waiver of Sovereign Immunity—Dangerous Condition of Public Entity's Property Created by Employee

Your verdict must be for plaintiff if you believe[1, 2]:

First, *(here describe condition that made the public entity's property dangerous, such as "there was oil on the gymnasium floor" or "the table saw was unguarded"),* and as a result the defendant's *(describe property, such as "gymnasium floor" or "table saw")* was not reasonably safe, and

Second, such condition was created by an employee of *(name of public entity)* within the scope and course of employment[3], and

Third, the employee was thereby negligent[4], and

Fourth, as a direct result of such negligence[4], plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recovery by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (2016 Revision)

1. Where comparative fault is submissible, modify this instruction in accordance with MAI 37.01. For submission of plaintiff's comparative fault for failure to keep a careful lookout, see MAI 32.28.

2. If there is a factual dispute about the ownership or control of the property, add: "First, defendant (*identify the public entity*) either owned or controlled the (*describe the property, such as "sidewalk", "manhole", "drainage ditch")*, and . . .". Then renumber the other paragraphs of the verdict directing instruction. See *Walton v. City of Seneca*, 420 S.W.3d 640 (Mo.App. S.D. 2013); *Spielvogel v. City of Kansas City*, 302 S.W.3d 108 (Mo.App. W.D. 2009); *Thomas v. Clay County Election Board*, 261 S.W.3d 574 (Mo.App. W.D. 2008). Compare, *Randel v. City of Kansas City*, 467 S.W.3d 383 (Mo.App. W.D. 2015).

3. Delete the phrase "within the scope and course of employment" if not in issue. If in issue, the phrase must be defined. See Chapter 13.00 and particularly MAI 13.05, which will fit the facts of most cases.

4. The terms “negligent” and “negligence” must be defined. See definitions in Chapter 11.00.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. *See* MAI 37.01.

Committee Comment (1993 Revision)

A. This verdict directing instruction is for use in cases under § 537.600.1(2), RSMo, relating to a dangerous condition of property created by an employee of a public entity. For cases in which the dangerous condition of property is one premised upon actual or constructive notice to the public entity as described in § 537.600.1(2), see MAI 31.16.

B. Where suit involves multiple causes of damages, see MAI 19.01.

C. Where suit is for wrongful death, see MAI 20.01 and 20.02.

D. Where suit involves a dangerous condition on private land, see MAI 22.03.

E. Where suit is for loss of services or medical expenses of a dependent, see MAI 31.04.

F. Where suit involves liability of an adjoining landowner for a dangerous condition created or enhanced by the adjoining landowner on a public sidewalk, see MAI 22.09.

Research References

West’s Key Number Digest
Negligence ⚷305

31.18 [1994 New] Paternity Actions—No Statutory Presumption

Your verdict must be that *(state the name of the putative father)* is the natural father of *(state the name of the child)* if you believe:

First, *(state the name of the putative father)* and *(state the name of the child's natural mother)* had sexual intercourse, and

Second, that *(state the name of the child)* was conceived as a result of such sexual intercourse between *(state the name of the putative father)* and *(state the name of the mother).*

Committee Comment (1998 Revision)

A. This paternity verdict directing instruction is not be used to submit the statutory presumptions in § 210.822, RSMo.

B. The burden of proof is on the party seeking to establish paternity. *See* MAI 3.08. Use verdict form MAI 36.28.

C. For paternity actions in which a statutory presumption applies, see MAI 31.19 for the verdict directing instruction. If clear and convincing evidence rebutting the statutory presumption is presented, see MAI 31.20.

D. This instruction and MAI 31.19 (submitting a statutory presumption) may be submitted in the alternative in an appropriate case.

E. MAI 3.08, MAI 31.18, MAI 31.19, MAI 31.20, and MAI 36.28 were drafted for civil paternity actions under §§ 210.817 *et seq.*, RSMo. Effective July 1, 1997, § 210.839.4, RSMo, was amended to provide that no party in such a paternity action has a right to trial by jury. The Committee has chosen not to withdraw these instructions and the related verdict form in the event that they are instructive or perhaps useful in the future since the Supreme Court has held that the Parentage Act (§§ 210.817 *et seq.*) is not the exclusive means to determine paternity. *Matter of Nocita*, 914 S.W.2d 358 (Mo.banc 1996).

Research References

West's Key Number Digest
Parent and Child ⚿205(1), 205(2), 229

31.19 [1994 New] Paternity Actions—Statutory Presumption

In your verdict you must find that *(state the name of putative father)* is the natural father of *(state the name of child)* if you believe *(here set out facts which give rise to the statutory presumption, such as "(name of child) was born during the marriage of (name of mother) and (name of putative father)")*[1].

* [unless you believe that *(state the name of putative father)* is not the natural father of *(state the name of child)* by reason of Instruction Number ______ *(here insert number of rebuttal instruction)*.]

Notes on Use (1994 New)

1. Insert those ultimate facts necessary to establish any of the statutory presumptions set out in § 210.822, RSMo.

* Add this bracketed phrase only if plaintiff submits a statutory presumption of paternity and defendant submits a rebuttal of that statutory presumption under MAI 31.20.

Committee Comment (1998 Revision)

A. This paternity verdict directing instruction is to be used to submit any of the statutory presumptions in § 210.822, RSMo. See burden of proof instruction MAI 3.08 and MAI 36.28.

B. If clear and convincing evidence rebutting the statutory presumption is presented, see MAI 31.20. For paternity actions not relying on a statutory presumption, see MAI 31.18.

C. This instruction and a verdict directing instruction based on MAI 31.18 may be submitted in the alternative in an appropriate case.

D. MAI 3.08, MAI 31.18, MAI 31.19, MAI 31.20, and MAI 36.28 were drafted for civil paternity actions under §§ 210.817 *et seq.*, RSMo. Effective July 1, 1997, § 210.839.4, RSMo, was amended to provide that no party in such a paternity action has a right to trial by jury. The Committee has chosen not to withdraw these instructions and the related verdict form in the event that they are instructive or perhaps useful in the future since the Supreme Court has held that the Parentage Act (§§ 210.817 *et seq.*) is not the exclusive means to determine paternity. *Matter of Nocita*, 914 S.W.2d 358 (Mo.banc 1996).

Research References

West's Key Number Digest
Parent and Child ⚷205(1), 205(2), 229

31.20 [1994 New] Paternity Actions—Rebuttal of Statutory Presumption

In your verdict you must not find that *(state the name of putative father)* is the natural father of *(state the name of child)* if you believe *(here set out facts which rebut the presumption that defendant is the natural father, such as, "(state name of putative father) was sterile")*[1]

Notes on Use (1994 New)

1. Here insert those facts, which must be shown by clear and convincing evidence under § 210.822.2, RSMo, that rebut the statutory presumption submitted under MAI 31.19.

Committee Comment (1998 New)

A. MAI 3.08, MAI 31.18, MAI 31.19, MAI 31.20, and MAI 36.28 were drafted for civil paternity actions under §§ 210.817 *et seq.*, RSMo. Effective July 1, 1997, § 210.839.4, RSMo, was amended to provide that no party in such a paternity action has a right to trial by jury. The Committee has chosen not to withdraw these instructions and the related verdict form in the event that they are instructive or perhaps useful in the future since the Supreme Court has held that the Parentage Act (§§ 210.817 *et seq.*) is not the exclusive means to determine paternity. *Matter of Nocita*, 914 S.W.2d 358 (Mo.banc 1996).

Research References

West's Key Number Digest
Parent and Child ⚷205(1), 205(2), 229

31.21 [2012 Withdrawn] Partial Invalidity of Will Due to Fraud

Historical Note

(MAI 31.21 and its related Notes on Use have been withdrawn. All instructions and illustrations related to Will Contests have been collected in Chapter 15 of MAI—Civil. MAI 31.21 has been replaced by MAI 15.05 (2012 Revision)).

31.22 [2012 Withdrawn] Partial Invalidity of Will Due to Undue Influence

Historical Note

(MAI 31.22 and its related Notes on Use have been withdrawn. All instructions and illustrations related to Will Contests have been Collected in Chapter 15 of MAI—Civil. MAI 31.22 has been replaced by MAI 15.06 (2012 Revision)).

31.23 [2000 New] Negligent Infliction of Emotional Distress

In a verdict directing instruction submitting negligent infliction of emotional distress, the essential elements are:

, such [negligence] [failure][1] involved an unreasonable risk of causing emotional distress, and

, defendant knew or by using ordinary care[2] could have known of such risk, and

, as a direct result[3] of such [negligence] [failure][1], plaintiff sustained medically diagnosable and significant emotional distress.

The above paragraphs would be substituted for the "damage" paragraph of an applicable verdict directing instruction. Thus, if verdict directing instruction 31.02(3) *(res ipsa loquitur)* were to be modified for a negligent infliction of emotional distress case to submit the case against the owner of the elevator in *Bass v. Nooney Co.*, 646 S.W.2d 765 (Mo.banc 1983), it would read as follows:

Your verdict must be for plaintiff if you believe:[4]

First, defendant owned the elevator, and

Second, the elevator stalled between floors, and

Third, from the fact of such occurrence and the reasonable inferences therefrom, such occurrence was directly caused by defendant's negligence[1],

Fourth, such negligence[1] involved an unreasonable risk of causing emotional distress, and

Fifth, defendant knew or by using ordinary care[2] could have known of this risk, and

Sixth, as a direct result[3] of such negligence, plaintiff sustained medically diagnosable and significant emotional distress.

* [unless you believe that plaintiff is not entitled to recover by reason of Instruction Number ______ *(here insert number of affirmative defense instruction)*].

Notes on Use (2000 New)

1. Select the appropriate term. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

2. The term "ordinary care" must be defined. See definitions in Chapter 11.00.

3. Where suit involves multiple causes of damage, see MAI 19.01.

4. For modification of verdict directing instructions to submit comparative fault, see MAI 37.01.

* Add if affirmative defense is submitted. This bracketed material should not be used to submit comparative fault. See MAI 37.01.

Committee Comment (2000 New)

A. In *Bass v. Nooney Co.*, 646 S.W.2d 765, 772–73 (Mo.banc 1983), the Supreme Court of Missouri held: "Instead of the old impact rule, a plaintiff will be permitted to recover for emotional distress provided: (1) the defendant should have realized that his conduct involved an unreasonable risk of causing the distress; and (2) the emotional distress or mental injury must be medically diagnosable and must be of sufficient severity to be medically significant."

B. In *K.G. v. R.T.R.*, 918 S.W.2d 795 (Mo.banc 1996), the Court observed: "To plead an action for negligent infliction of emotional harm, a plaintiff must allege the duty exists, that the defendant should have realized that his conduct involved an unreasonable risk of causing emotional distress, and the distress or mental injury must be medically diagnosable and must be of sufficient severity so as to be medically significant." 918 S.W.2d at 800.

C. *Asaro v. Cardinal Glennon Memorial Hosp.*, 799 S.W.2d 595, 597–98 (Mo.banc 1990), imposes a "zone of danger" requirement when the claim arises from observing an injury to a third person. The Committee takes no position as to whether, in a third-party injury case such as *Asaro,* the emotional distress must be medically diagnosable and medically significant. *Compare Jackson v. Christian Hosp.*, 823 S.W.2d 137 (Mo.App. E.D. 1992), and *Sale v. Slitz*, 998 S.W.2d 159 (Mo.App. S.D. 1999), relating to damages in a case involving "right of sepulchre."

D. *See also* Restatement (Second) Torts, § 313.

Research References

West's Key Number Digest
Negligence ⚷1720

31.24 [2012 Withdrawn] Employment Discrimination—Missouri Human Rights Act

Historical Note

(MAI 31.24 (2005 New) and its related Notes on Use and Committee Comment have been withdrawn. All instructions related to the Employment Discrimination have been collected in Chapter 38 of MAI-Civil. MAI 31.24 has been replaced by MAI 38.01(A) (2018 Revision) and MAI 38.01(B) (2018 Revision).

31.25 [2012 Withdrawn] Lawful Justification—Employment Discrimination—Missouri Human Rights Act

Historical Note

(MAI 31.25 (2005 New) and its related Notes on Use and Committee Comment have been withdrawn. All instructions related to Employment Discrimination have been collected in Chapter 38 of MAI-Civil. MAI 31.25 has been replaced by MAI 38.02 (2018 Revision)).

31.26 [2007 New] Negligent Misrepresentation—Pecuniary Loss

Your verdict must be for plaintiff if you believe:

First, defendant in the course of defendant's [business] [profession] [employment][1] *(describe act such as "represented to plaintiff that the motor vehicle was never in an accident")*, and

Second, such representation was made by defendant with the intent that plaintiff rely on such representation in *(purchasing the motor vehicle)*, and

Third, such representation was material to the *(purchase of the motor vehicle)*, and

Fourth, such representation was false, and

Fifth, defendant failed to use ordinary care[2] in making such representation, and

Sixth, plaintiff relied on such representation in *(making the purchase)* and such reliance was reasonable under the circumstances, and

Seventh, as a direct result of such representation, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ________ *(here insert number of affirmative defense instruction)*].

Notes on Use (2007 New)

1. Select the appropriate phrase. If the transaction is one involving some other "pecuniary interest" of the defendant as that phrase is used in Restatement (Second) Torts § 552 (1977), insert an appropriate phrase.

2. The phrase "ordinary care" must be defined. See definitions in MAI Chapter 11.00.

* Add if affirmative defense is submitted.

Committee Comment (2021 Revision)

A. For fraudulent misrepresentation, see MAI 23.05

B. Where agency is in issue, see MAI 18.01.

C. This instruction results from the adoption of Restatement (Second) Torts § 552 (1977) in the cases of *Colgan v. Washington Realty Co.*, 879 S.W.2d 686 (Mo.App. E.D. 1994); *Kesselring v. St. Louis Group, Inc.*, 74 S.W.3d 809, 813 (Mo.App. E.D. 2002); and the discussion of the verdict directing instruction in *Gurley v. Montgomery First National Bank*, 160 S.W.3d 863 (Mo.App. S.D. 2005).

D. The Restatement (Second) Torts distinguishes between misrepresentations that cause pecuniary loss (§ 551 and § 552) and those which result in physical injury (§ 311). MAI 23.05 and MAI 31.26 are intended to apply to "pecuniary loss" cases.

E. Unlike Restatement (Second) Torts § 551 (1977) (which deals with misrepresentation by omission), § 552 is not limited to business transactions. It takes into account any transaction involving a pecuniary interest.

F. The elements of the cause of action as set forth in *Colgan v. Washington Realty Co.*, 879 S.W.2d 686, 689 (Mo.App. E.D. 1994), are:

(1) speaker supplied information in the course of his/her business or because of some other pecuniary interest;

(2) due to speaker's failure to exercise reasonable care or competence in obtaining or communicating this information, the information was false;

(3) speaker intentionally provided the information for the guidance of a limited group of persons in a particular business transaction;

(4) listener justifiably relied on the information; and

(5) as a result of listener's reliance on the statement, he/she suffered a pecuniary loss.

G. *Wengert v. Thomas L. Meyer*, 152 S.W.3d 379 (Mo.App. E.D. 2004), involves negligent failure to disclose a water drainage problem. This instruction should not be used to submit a misrepresentation by omission (fraudulent or negligent) contemplated by Restatement (Second) Torts § 551.

H. For a discussion of the distinction between negligent misrepresentation and reckless disregard for truth or falsity (as submitted by MAI 23.05), *see Colgan,* 879 S.W.2d at 689, n.1.

I. The Restatement (Second) Torts distinguishes between misrepresentations that cause pecuniary loss (§ 551 and § 552) and those which result in physical injury (§ 311). MAI 23.05 and MAI 32.26 are intended to apply to pecuniary loss cases.

Cases involving multiple misrepresentations.

J. Submission of multiple representations in a single verdict directing instruction may create a problem in determining whether all requisite elements (i.e. falsity, materiality, knowledge, etc.) have been found as to the same representation. A possible approach would be to submit a separate verdict directing instruction as to each alleged misrepresentation, all in a single package with a single damage instruction and a single verdict form.

K. Where suit involves multiple causes of damage, see MAI 19.01.

Research References

West's Key Number Digest
Negligence ⚷1720

31.27 [2012 Withdrawn] Wrongful Discharge in Violation of Public Policy

Historical Note

(MAI 31.27 (2011 New) and its related Notes on Use and Committee Comment have been withdrawn. All instructions related to the Employment Discrimination have been collected in Chapter 38 of MAI-Civil. MAI 31.27 has been replaced by MAI 38.03 (2012 Revision)).

32.00

AFFIRMATIVE DEFENSES

32.01 General Comment
32.01(1) Comparative Fault—Single Negligent Act Submitted
32.01(2) Comparative Fault—Multiple Negligent Acts Submitted
32.01(3) Comparative Fault—Wrongful Death
32.02 Comparative Fault—Guest Passenger—Failure to Warn Driver of Known Dangers
32.03 Comparative Fault—Guest Passenger—Failure to Warn Driver of Dangers Which Were "Reasonably Apparent"
32.04 Comparative Fault—Guest Passenger—Interfering With Driver
32.05 Comparative Fault—Guest Passenger—Riding With Intoxicated Driver
32.06 Comparative Fault—Malpractice
32.07 Contributory Negligence—F.E.L.A. [Withdrawn 1996]
32.07(A) Failure to Mitigate Damages—F.E.L.A. [Withdrawn 2012]
32.07(B) Contributory Negligence—F.E.L.A. [Withdrawn 2012]
32.08 Battery Actions—Consent
32.09 Battery Actions—Ejecting Trespasser
32.10 Battery Actions—Resisting Invasion of Property
32.11 Battery Actions—Self-Defense
32.12 Libel and Slander—Truth
32.13 False Imprisonment—Shoplifting
32.14 Payment for Services Furnished Decedent
32.15 Gratuitous Furnishing of Services
32.16 Family Relationship
32.17 Will Contest—Fraud Invalidating Will [Withdrawn 2012]
32.18 Will Contest—Undue Influence [Withdrawn 1991]
32.19 Life Insurance—Misrepresentation of Material Fact—Not Warranted
32.20 Life Insurance—Breach of Warranty
32.21 Release
32.22 Avoidance of Affirmative Defense—Release Obtained by Fraud
32.23 Product Liability—Strict Liability—Contributory Fault
32.24 Insurance Policy Defense
32.25 Warranty—Exclusion of Implied Warranty Under UCC
32.26 Conversion—Consent

32.27 Conversion—Abandonment
32.28 Comparative Fault—Invitee Injured—Failure to Keep a Lookout
32.29 Failure to Mitigate Damages

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West's Key Number Digest

Assault and Battery ⚷43(2); Automobiles ⚷246(2.1); Executors and Administrators ⚷451(3); False Imprisonment ⚷40; Insurance ⚷3554, 3579; Labor and Employment ⚷2826, 2829; Libel and Slander ⚷124(3); Negligence ⚷1744, 1746; Products Liability ⚷421, 433; Trover and Conversion ⚷67; Wills ⚷332

A.L.R. Library

A.L.R. Index, Assault and Battery; Comparative Negligence; Contributory Negligence or Assumption of Risk; Conversion; Executors and Administrators; False Imprisonment and Arrest; Labor and Employment; Libel and Slander; Wills

West's A.L.R. Digest, Assault and Battery ⚷43(2); Automobiles ⚷246(2.1); Executors and Administrators ⚷451(3); False Imprisonment ⚷40; Insurance ⚷3554, 3579; Labor and Employment ⚷2826, 2829; Libel and Slander ⚷124(3); Negligence ⚷1744, 1746; Products Liability ⚷421, 433; Trover and Conversion ⚷67; Wills ⚷332

Legal Encyclopedias

Am. Jur. 2d, Assault and Battery §§ 116 to 129

C.J.S., Assault §§ 21, 25, 32, 61; Employers' Liability for Injuries to Employees § 401; Wills § 766

32.01 [2012 Revision] General Comment

Some of the instructions in Chapter 32 are comparative fault instructions. Contributory negligence instructions as they existed in previous editions of MAI prior to the adoption of comparative fault have been revised to conform to the method of submission in MAI 37.02. Numbering of those instructions has remained the same for purposes of historical consistency.

Other instructions in this Chapter are complete affirmative defenses.

Annotations to instructions prior to the adoption of comparative fault remain in this edition.

Committee Comment (2010 New)

If a party has properly pleaded an affirmative defense pursuant to Rule 55.08 and if there is substantial evidence in support of the affirmative defense, even if there is also evidence of the contrary, then a party is entitled to an affirmative defense instruction. *Romeo v. Jones*, 144 S.W.3d 324 (Mo.App. E.D. 2004). The propriety of any affirmative defense is derived from either case law or statutory authority. *See Meyer v. Astrazeneca Pharmaceuticals, L.P.*, 224 S.W.3d 106 (Mo.App. E.D. 2007) and § 537.764, RSMo.

Research References

West's Key Number Digest
Negligence ⚷1744

32.01(1) [1991 Revision] Comparative Fault—Single Negligent Act Submitted

In your verdict you must assess a percentage of fault to plaintiff [, whether or not defendant was partly at fault,][1] if you believe:

First, plaintiff drove at an excessive speed, and

Second, plaintiff was thereby negligent,[2] and

Third, such negligence[2] of plaintiff directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (1991 Revision)

1. This bracketed phrase may be added at defendant's option.

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

This sample instruction submits a single act of comparative fault. If more than one act is submitted in the disjunctive, use MAI 32.01(2). For other specifications of negligence which may be hypothesized in a comparative fault instruction, see Chapter 17.00.

See Chapter 37.00 and Illustration 35.14 with regard to comparative fault generally.

Research References

West's Key Number Digest
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1. In general

Failure to define "ordinary care" used in contributory negligence instruction was not necessarily prejudicial. *Robinett v. Kansas City Power & Light Co.*, 484 S.W.2d 506 (Mo.App. 1972).

Contributory negligence instruction must hypothesize facts which negate an essential element of plaintiff's case. *Portman v. Sinclair Oil Co.*, 518 S.W.2d 625 (Mo. 1975).

Avoidance of statute of limitation. *Smile v. Lawson*, 506 S.W.2d 400 (Mo. 1974).

Defendant may submit affirmative defense or converse, or both. *Jefferson v. Biggar*, 416 S.W.2d 933 (Mo. 1967).

It is permissible for defendant to rely on multiple defenses even though inconsistent; while plaintiff may not predicate recovery upon theory that is contrary to his own positive evidence; defendant pleading both general denial and comparative fault has right to submit comparative fault to jury even though issue contradicts some of defendant's own positive evidence. *Michael v. Kowalski*, 813 S.W.2d 6 (Mo.App. W.D. 1991).

Error in giving a comparative fault instruction harmless where jury found no negligence on the part of defendant. *Hyman v. Robinson*, 713 S.W.2d 300 (Mo.App. E.D. 1986).

Evidence must show allegedly negligent act was proximate cause of injury. *Cella v. Evangelical Deaconess Society of St. Louis*, 581 S.W.2d 881 (Mo.App. E.D. 1979).

Evidence supported defendant's contributory negligence instruction on (a) rearend collision, (b) failure to keep a lookout, and (c) following too closely. *Pitezel v. Danielson*, 571 S.W.2d 694 (Mo.App. 1978).

Defendant may submit both converse and contributory negligence instructions. *Van Dyke v. Major Tractor & Equipment Co.*, 557 S.W.2d 11 (Mo.App. 1977).

Plaintiff need not negate contributory negligence where defendant did not submit an instruction on that defense. *Lawley v. Kansas City*, 516 S.W.2d 829 (Mo.App. 1974).

Defendant properly allowed to submit both converse and affirmative defense instructions. *Fehlbaum v. Newhouse Broadcasting Corp.*, 483 S.W.2d 664 (Mo.App. 1972).

Failure of plaintiff's verdict director to negate defendant's given contributory negligence instruction was not error where defendant's pleading and the evidence did not warrant the giving of the contributory negligence instruction. *Mulliken v. Presley*, 442 S.W.2d 153 (Mo.App. 1969).

Defendant may properly submit contributory negligence, but not *concurrent* negligence. *Moore v. Quality Dairy Co.*, 425 S.W.2d 261 (Mo.App. 1968).

Defendant not entitled to instruction on *concurrent* negligence of plaintiff and defendant. *Harris v. Quality Dairy*, 423 S.W.2d 8 (Mo.App. 1967).

2. Deviation

Omission of the connecting word "and" between paragraphs of a verdict director held not to be prejudicial error. *Goff v. St. Luke's Hosp. of Kansas City*, 753 S.W.2d 557 (Mo.banc 1988).

Deviation from Paragraph Third of contributory negligence instruction by omitting the word "directly" qualifying the word "caused" was prejudicially erroneous. *Meredith v. Missouri Pacific Ry. Co.*, 467 S.W.2d 79 (Mo. 1971).

MAI 28.01 [Now 32.01] submitted First, failure to keep a lookout, and "Second, . . . was negligence." Error for failure to use the connecting words "in the respect submitted in paragraph First." *Gousetis v. Bange*, 425 S.W.2d 91 (Mo. 1968).

Omission of "for damages" from bracketed phrase not presumptively prejudicial where it was not possible that jury would confuse plaintiff's claim for damages with his claims on how the collision occurred. *Griffon v. Northcott*, 655 S.W.2d 883 (Mo.App. E.D. 1983).

Evidence supported defendant's contributory negligence instruction on (a) rear-end collision, (b) failure to keep a lookout, and (c) following too closely. *Pitezel v. Danielson*, 571 S.W.2d 694 (Mo.App. 1978).

Omission of "and" between numbered paragraphs was presumptively error. *Kirkendall v. Townsend*, 559 S.W.2d 561 (Mo.App. 1977).

3. Modification

Rear-end instruction may be used by

defendant driver to submit *contributory negligence* of plaintiff-driver of following car. *Mueller v. Storbakken*, 583 S.W.2d 179 (Mo.banc 1979).

Pedestrian v. Motorist. Defendant's contributory negligence submitting that plaintiff negligently moved into motorist's path when she could have seen him and avoided contact approved in substance as submitting that plaintiff left a place of safety and entered a dangerous position. *Anderson v. Sellers*, 521 S.W.2d 33 (Mo.App. 1975).

Where plaintiff was injured by beam falling from hoist, defendant properly modified MAI 32.01 by hypothesizing plaintiff's constructive knowledge of danger and negligence in moving from a position of safety to one of danger. *Kraus v. Auxvasse Stone & Gravel Co.*, 444 S.W.2d 434 (Mo. 1969).

In slip-and-fall case defendant was entitled to its own modified contributory negligence instruction on plaintiff's contributory negligence in failing to keep a careful lookout. Refusal was error not waived by the requirement in plaintiff's verdict director that he had neither actual nor constructive knowledge of the dangerous condition. *Wyatt v. Southwestern Bell Telephone Co.*, 573 S.W.2d 386 (Mo.App. 1978).

In slip and fall case, defendants' modified contributory negligence instruction erroneously enlarged upon the "failed to keep a careful lookout" language, was prolix and erroneous. *Shackman v. Lincoln Property Co.*, 556 S.W.2d 50 (Mo.App. 1977).

A modified MAI or a not-in-MAI instruction on contributory negligence must conform to the philosophy of MAI. *Holt v. Myers*, 494 S.W.2d 430 (Mo.App. 1973).

Defendant's contributory negligence verdict director properly submitted "suddenly turned to the left [changing lanes] at a time when such movement could not be made with reasonable safety." *McDaniels v. Hall*, 426 S.W.2d 751 (Mo.App. 1968).

4. Amendment for dual submissions

Plaintiff submitted both primary and humanitarian negligence; defendant's contributory negligence instruction referred to plaintiff's primary negligence instruction but erroneously failed to change "verdict" to "finding" as required by Notes on Use, which must be "religiously followed." *Ronan v. Reidel*, 510 S.W.2d 762 (Mo.App. 1974).

5. Separate instructions

Even where plaintiff submits more than one theory of recovery against multiple defendants (e.g., strict liability and negligence), defendants are only entitled to a single comparative fault instruction against plaintiff. Under Missouri principles of comparative fault, plaintiff's negligence is not compared with that of defendant A and then again with that of defendant B, but rather it is compared with the cumulative fault of all defendants. *Egelhoff v. Holt*, 875 S.W.2d 543 (Mo.banc 1994).

Submission of separate contributory negligence instructions (comparative fault) by each defendant held to be erroneous, but not prejudicial under the facts of this case. *Cornell v. Texaco, Inc.*, 712 S.W.2d 680 (Mo.banc 1986).

6. Roving commission

In bricklayer's action against employer for failure to furnish a safe place to work, a contributory negligence instruction authorized a defendant's verdict if plaintiff "knew of the conditions for work." This was a roving commission since it failed to submit what plaintiff did or failed to do that was negligent. *Todd v. Watson*, 501 S.W.2d 48 (Mo. 1973).

Instruction hypothesizing plaintiff's contributory negligence in riding on an open truck bed without hypothesizing the surrounding circumstances was error. *Ballew v. Schlotzhauer*, 492 S.W.2d 774 (Mo. 1973).

Contributory negligence instruction in quick-draw case was erroneous as a roving commission for submitting that decedent's mere act of engaging in the contest could be negligent. *Turpin v. Shoemaker*, 427 S.W.2d 485, 488, 491 (Mo. 1968).

Contributory negligence submission that "plaintiff's conduct was negligent" did not submit the ultimate fact in issue and was condemned as a roving commission. *Pollard v. General Elevator Engineering Co.*, 416 S.W.2d 90 (Mo. 1967).

7. Degree of care

In suit by tenant's invitee against landlord the court properly gave MAI 32.01 to present the issue of plaintiff's contributory negligence in failing to keep a careful lookout; that phrase properly imposed a duty of ordinary care. *Helfrick v. Taylor*, 440 S.W.2d 940 (Mo. 1969).

The Notes on Use to MAI 17.04 indicate that one or more of the specifications provided therein may be submitted as an act of contributory negligence as well, but they also provide that the phrase "highest degree of care" must be defined. The language is mandatory, not permissive, and failure to follow is presumed to be error. *Kindle v. Keene*, 676 S.W.2d 82 (Mo.App. S.D. 1984).

8. Contributory fault

Unreasonable use of product with knowledge of defect is "contributory fault" and bars recovery. *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969).

Whether contributory negligence instruction confused jury by improperly assuming controverted fact is tested by principle of "reasonable men" construction. *Kewanee Oil Co. v. Remmert-Werner, Inc.*, 508 S.W.2d 23 (Mo.App. 1974).

9. Evidentiary support

Contributory negligence instruction submitting defendant's multiple disjunctive acts must have evidentiary support for each. *Saupe v. Kertz*, 523 S.W.2d 826 (Mo.banc 1975).

Submission of failure to swerve properly refused absent showing of available time and space. *Middleman v. Complete Auto Transit, Inc.*, 486 S.W.2d 456 (Mo.banc 1972).

Instruction hypothesizing plaintiff's contributory negligence in riding on an open truck bed without hypothesizing the surrounding circumstances was error. *Ballew v. Schlotzhauer*, 492 S.W.2d 774 (Mo. 1973).

Fact that plaintiff walked into the path of a clearly visible automobile is sufficient to support an instruction on failing to keep a careful lookout. *Young v. Grotsky*, 459 S.W.2d 306 (Mo. 1970).

Evidence must show a causal connection between negligent act and injury; where plaintiff-driver knew approaching school bus was going to stop, driver improperly submitted negligence of approaching bus driver in thereafter giving another belated signal to stop. *Pruneau v. Cain*, 458 S.W.2d 265 (Mo. 1970).

Sufficiency of evidentiary support for contributory negligence submission is measured by defendant's evidence and is not limited to plaintiff's evidence. *Creager v. Chilson*, 453 S.W.2d 941 (Mo. 1970).

Contributory negligence instruction must have evidentiary support. *Ryan v. Manheimer*, 435 S.W.2d 366 (Mo. 1968).

It is prejudicial error to submit an instruction on contributory negligence where there is no substantial evidence to support it. The same rule applies with respect to the negligence of a plaintiff in a comparative negligence context. *Finninger v. Johnson*, 692 S.W.2d 390 (Mo.App. E.D. 1985).

Where defendant failed to supply the element of causation in regard to plaintiff's alleged excessive speed, submission of excessive speed as an assignment of contributory negligence was error. *Roper v. Archibald*, 680 S.W.2d 743 (Mo.App. S.D. 1984).

Error to submit failure to sound a horn where only evidence was answer of witness that she did not recall hearing a horn. *Baker v. Brinker*, 585 S.W.2d 256 (Mo.App. E.D. 1979).

Pedestrian hit by defendant's car at highway's edge, as she fell or was pushed into highway. Contributory negligence instruction erroneously submitted plaintiff "moved" into defendant's path since there was no evidence plaintiff moved voluntarily. *Kuhlmann v. Rowald*, 549 S.W.2d 583 (Mo.App. 1977).

Where rear-ended plaintiff had adequate warning that preceding car was going to slow down and turn but suddenly braked and stopped without signalling, her contributory negligence was properly submitted by MAI 32.01 to 17.12. *Schoessel v. Robertson*, 480 S.W.2d 95 (Mo.App. 1972).

Each element of a disjunctive contributory negligence instruction must be supported by evidence. *Shaffer v. Kansas City Transit, Inc.*, 463 S.W.2d 606 (Mo.App. 1971).

Defendant's MAI 28.01 [Now 32.01] to 17.05 to 17.12 (contributory negligence involving lookout and sudden stop) proper in form, but erroneous where there was no evidence that plaintiff's stop was sudden. *Markle v. Fallek*, 424 S.W.2d 756 (Mo.App. 1968).

10. Proximate cause

Error to give MAI 28.01 [Now 32.01] to 17.11 as contributory negligence (slowing suddenly without warning) where (1) defendant was vague as to whether plaintiff's brake lights did go on, and (2) defendant was not looking and would not have seen the lights if they were on. *Brassfield v. Sears*, 421 S.W.2d 321 (Mo. 1967).

11. Knowledge

Where plaintiff acknowledged she knew dangerous condition of step, a modified contributory negligence instruction properly omitted a requirement plaintiff knew of dangerous condition. *Weisman v. Herschend Enterprises*, 509 S.W.2d 32 (Mo. 1974).

In bricklayer's action against employer for failure to furnish a safe place to work, a contributory negligence instruction authorized a defendant's verdict if plaintiff "knew of the conditions for work." This was a roving commission since it failed to submit what plaintiff did or failed to do that was negligent. *Todd v. Watson*, 501 S.W.2d 48 (Mo. 1973).

When plaintiff's contributory negligence vel non depends not only on his knowledge of surrounding condition but also on his appreciation of the dangerous nature of those conditions, MAI 32.01 must be modified to submit the latter element. *Koirtyohann v. Washington Plumbing & Heating Co.*, 471 S.W.2d 217 (Mo. 1971).

Plaintiff-invitee's actual or constructive knowledge of danger properly submitted by a not-in-MAI contributory negligence instruction. *Cover v. Phillips Pipe Line Co.*, 454 S.W.2d 507 (Mo. 1970).

Verdict-director basing liability on defendant's negligent failure to warn plaintiff was erroneous in omitting element of plaintiff's lack of knowledge of danger. *Cover v. Phillips Pipe Line Co.*, 454 S.W.2d 507 (Mo. 1970).

It is contributory negligence to fly an overweight airplane only if flyer has actual or constructive knowledge of the overweight, and it is error to omit that element from a verdict director. *Bledsoe v. Northside Supply & Development Co.*, 429 S.W.2d 727 (Mo. 1968).

Contributory negligence instruction in slip-and-fall case erroneous for omission of a requirement that plaintiff had actual or constructive knowledge of dangerous condition. *Davidson v. International Shoe Co.*, 427 S.W.2d 421 (Mo. 1968).

Contributory negligence instruction erroneously omitted element of plaintiff's knowledge and appreciation of danger. *Howard v. Research Hospital & Medical Center, Inc.*, 563 S.W.2d 111 (Mo.App. 1978).

Hotel guest injured in common area need not show lack of knowledge of defect (MAI 22. 05, Tenant Injured, etc.), and court erred in requiring plaintiff to so show (MAI 22.03, Invitee Injured, etc.). Defendant could have submitted guest's contributory negligence under guest submission. *Wilder v. Chase Resorts, Inc.*, 543 S.W.2d 527 (Mo.App. 1976).

Where plaintiff was injured by cave-in of ditch where he was working, defendants' contributory negligence instruction properly hypothesized that ditch was dangerous and plaintiff had actual or constructive knowledge of danger and plaintiff was negligent. *Koirtyohann v. Washington Plumbing & Heating Co.*, 494 S.W.2d 665 (Mo.App. 1973).

In slip and fall case, defendant properly modified MAI 32.01 to exonerate defendant if plaintiff failed to keep a careful lookout; unnecessary to also submit plaintiff's knowledge of readily apparent danger. *Fehlbaum v. Newhouse Broadcasting Corp.*, 483 S.W.2d 664 (Mo.App. 1972).

12. Apparent danger

Where plaintiff acknowledged she knew dangerous condition of step, a modified contributory negligence instruction properly omitted a requirement plaintiff knew of dangerous condition. *Weisman v. Herschend Enterprises*, 509 S.W.2d 32 (Mo. 1974).

When plaintiff's contributory negligence vel non depends not only on his knowledge of surrounding condition but also on his appreciation of the dangerous nature of those conditions, MAI 32.01 must be modified to submit the latter element. *Koirtyohann v. Washington Plumbing & Heating Co.*, 471 S.W.2d 217 (Mo. 1971).

Plaintiff's contributory negligence properly submitted by incorporating MAI 17.04—Failure to Act After Danger Apparent—in MAI 32. 01. *Creager v. Chilson*, 453 S.W.2d 941 (Mo. 1970).

Contributory negligence instruction erroneously omitted element of plaintiff's knowledge and appreciation of danger. *Howard v. Research Hospital & Medical Center, Inc.*, 563 S.W.2d 111 (Mo.App. 1978).

In slip and fall case, defendant properly modified MAI 32.01 to exonerate defendant if plaintiff failed to keep a careful lookout; unnecessary to also submit plaintiff's knowledge of readily apparent danger. *Fehlbaum v. Newhouse Broadcasting Corp.*, 483 S.W.2d 664 (Mo.App. 1972).

13. Agency

Where wife-passenger and co-owner of car being driven by her husband was injured in a collision with defendant, it was error to instruct on contributory negligence of husband since his negligence is no longer attributable to her. (*Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970)). *Dickey v. Nations*, 479 S.W.2d 208 (Mo.App. 1972).

Where defense of contributory negligence depends on driver's being plaintiff's agent, it is error to submit a contributory negligence instruction without hypothesizing and defining agency. *Sanfilippo v. Bolle*, 432 S.W.2d 232 (Mo. 1968).

Where evidence did not show plaintiff's driver was her agent, it was error to give a contributory negligence instruction. *McAuliffe v. Vondera*, 494 S.W.2d 692 (Mo.App. 1973).

14. Right of way

Pedestrian v. motorist, contributory negligence instruction need not define "place of safety" or "immediate path." *Frantz v. State Farm Mutual Auto. Ins. Co.*, 526 S.W.2d 345 (Mo.App. 1975).

Modified MAI 28.01 [Now 32.01] to 14.02 proper as a defensive failure to yield right-of-way instruction against MAI 17.01 (violation of traffic signal) where there was evidence traffic signals were not working. *Jefferson v. Biggar*, 416 S.W.2d 933 (Mo. 1967).

In pedestrian's action against motorist, the motorist was entitled to a modified MAI 28.01 [Now 32.01(2)] on plaintiff's contributory negligence for failure to yield right-of-way contrary to city ordinance. *Morris v. Duker*, 414 S.W.2d 77 (Mo. 1967).

Contributory negligence instruction defining right-of-way by MAI 14.05 was proper where plaintiff drove into through highway, creating an immediate hazard. *Todd v. Presley*, 413 S.W.2d 173 (Mo. 1967).

15. Wrong side of road

Defendant not in error in submitting her counterclaim on MAI 32.01 (*drove* on the wrong side of the road) since it had not been amended to conform to MAI 17.13, amended (was on the wrong side of the road). *Pittock v. Gardner*, 530 S.W.2d 217 (Mo.banc 1975).

16. Unlighted vehicle

Defendant properly submitted that plaintiff operated an unlighted vehicle at night on the highway and was thereby contributorily negligent. (Common law negligence.) *Burt v. Becker*, 497 S.W.2d 411 (Mo. 1973).

17. Parking

Not-in-MAI contributory negligence instruction properly submitted parking or standing on highway without lights. *Stigers v. Harlow*, 419 S.W.2d 41 (Mo. 1967).

18. Railway crossing

PSC Rule 43C requiring motorist to reduce speed when approaching crossing properly used in contributory negligence instruction. *Silvey v. Missouri Pac. Ry. Co.*, 445 S.W.2d 354 (Mo. 1969).

32.01(2) [1991 Revision] Comparative Fault—Multiple Negligent Acts Submitted

In your verdict you must assess a percentage of fault to plaintiff [, whether or not defendant was partly at fault,][1] if you believe:

First, either:

plaintiff failed to keep a careful lookout, or

plaintiff drove at an excessive speed, or

plaintiff was following the defendant's car too closely, and

Second, plaintiff, in any one or more of the respects submitted in Paragraph First, was thereby negligent,[2] and

Third, such negligence[2] of plaintiff directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (1991 Revision)

1. This bracketed phrase may be added at defendant's option.

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

This sample instruction submits three separate specifications of negligence in the disjunctive. If defendant submits a single specification of negligence, use MAI 32.01(1). For other specifications of negligence which may be hypothesized in a comparative fault instruction, see Chapter 17.00.

See Chapter 37.00 and Illustration 35.14 with regard to comparative fault generally.

Research References

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Annotations

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1. In general

Instruction submitting two grounds of contributory negligence, one of which was unpleaded, was properly refused. *Zipp v. Gasen's Drug Stores, Inc.*, 449 S.W.2d 612 (Mo. 1970).

Plaintiff's multi-faceted contributory negligence instruction analyzed and denied. *Dorrin v. Union Elec. Co.*, 581 S.W.2d 852 (Mo.App. E.D. 1979).

Where plaintiff submitted both primary and humanitarian negligence, it was error to (1) converse plaintiff's primary verdict director and (2) give defendant's contributory negligence instruction without limiting each to plaintiff's primary negligence submission. *Payton v. Bi-State Development Agency*, 417 S.W.2d 522 (Mo.App. 1967).

2. Modification

When there was no evidence plaintiffs failed to give a warning signal, defendant's contributory negligence instruction combining MAI 32.01 with modifications of MAI 17.11 (slowing without adequate warning) and MAI 17.12 (stopping without adequate warning), was erroneous for substituting the words "at a time when it was not reasonably safe to do so." *Burton v. Bi-State Development Agency*, 468 S.W.2d 4 (Mo. 1971).

Verdict director should have allowed jury to find specific manner, based upon evidence, in which contributorily negligent plaintiff failed to heed warning, i.e., "failed to stop," etc.; abstract instruction gave jury roving commission. *Mott v. Missouri Pacific Railroad Co.*, 926 S.W.2d 81 (Mo.App. W.D. 1996).

Where plaintiff was injured while disconnecting a trailer from defendant's tractor, MAI 32.01 was properly modified to submit plaintiff's contributory negligence in failing to unfasten a safety chain or telling defendant it was safe to move the tractor. *Newsom v. Crockett*, 453 S.W.2d 674 (Mo.App. 1970).

3. Disjunctive submission

Affirmative defenses were not inconsistent in disjunctively submitting (1) that corporate plaintiff knew of danger and failed to warn its driver or (2) that driver knew of danger and negligently failed to avoid it. *Cover v. Phillips Pipe Line Co.*, 454 S.W.2d 507 (Mo. 1970).

Defendant's contributory negligence instruction (MAI 28.01 [Now 32.01] to 17.06) submitting plaintiff's failure to keep a lookout or failure to signal. *Lands v. Boyster*, 417 S.W.2d 942 (Mo. 1967).

Contributory negligence verdict director submitting failure to keep a lookout or failure to yield right-of-way at intersection. *Bauser v. DeNoble*, 412 S.W.2d 409 (Mo. 1967).

Erroneous inclusion of one assignment of contributory negligence in multiple disjunctive submission was prejudicial. *Roper v. Archibald*, 680 S.W.2d 743 (Mo.App. S.D. 1984).

A not-in-MAI contributory negligence instruction properly submitted, in the conjunctive, plaintiff's failure to keep a careful lookout and permitting his truck to contact an electric wire that was in plain view. *Robinett v. Kansas City Power & Light Co.*, 484 S.W.2d 506 (Mo.App. 1972).

4. Evidentiary support

Contributory negligence instruction submitting defendant's multiple disjunctive acts must have evidentiary support for each. *Saupe v. Kertz*, 523 S.W.2d 826 (Mo.banc 1975).

Where defendant failed to supply the element of causation in regard to plaintiff's alleged excessive speed, submission of excessive speed as an assignment of contributory negligence was error. *Roper v. Archibald*, 680 S.W.2d 743 (Mo.App. S.D. 1984).

5. Multiple defendants

Only single comparative fault instruction should be given where there are two defendants, even if their liability is premised on different theories; plaintiff's negligence is compared to cumulative negligence of all defendants. *Egelhoff v. Holt*, 875 S.W.2d 543 (Mo.banc 1994).

32.01(3) [1991 Revision] Comparative Fault—Wrongful Death

In your verdict you must assess a percentage of fault to decedent [, whether or not defendant was partly at fault,][1] if you believe:

First, either:

decedent failed to keep a careful lookout, or

decedent drove at an excessive speed, or

decedent was following the defendant's car too closely, and

Second, decedent, in any one or more of the respects submitted in Paragraph First, was thereby negligent,[2] and

Third, such negligence[2] of decedent directly caused or directly contributed to cause the death of decedent.

Notes on Use (1991 Revision)

1. This bracketed phrase may be added at defendant's option.

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

This instruction is for use in a wrongful death case. It submits the conduct of the decedent as the basis for comparative negligence and requires that the negligence directly cause or directly contribute to cause the death.

This sample instruction submits three separate specifications of negligence in the disjunctive. If defendant submits a single specification of negligence, modify Paragraph Second to use the format of Paragraph Second of MAI 32.01(1). For other specifications of negligence which may be hypothesized in a comparative fault instruction, see Chapter 17.00.

See Chapter 37.00 and Illustration 35.14 with regard to comparative fault generally.

Research References

West's Key Number Digest
Negligence ⚷1746

Annotations

1. In general

Deceased mine worker's survivors were entitled to new trial in wrongful death action against water truck owner due to plain error from combination of jury instructions on comparative fault, even though they submitted instruction which caused jury's confusion; survivors' instruction, which required jury to assign a percentage of fault to truck owner if, "as a direct result of such negligence," mine worker died, conflicted with truck owner's own instruction, which required assignment of percentage of fault to worker if his own negligence "directly caused or directly contributed to cause" his death, survivors had no clear indication that the "direct result" language was prohibited by truck owner's instruction, and each instruction, standing alone, was proper. *Bean v. Superior Bowen Asphalt Co., LLC*, 340 S.W.3d 275 (Mo.App. W.D. 2011).

32.02 [1991 Revision] Comparative Fault—Guest Passenger—Failure to Warn Driver of Known Dangers

In your verdict you must assess a percentage of fault to plaintiff [, whether or not defendant was partly at fault,][1] if you believe:

First, plaintiff knew that plaintiff was in immediate danger, and

Second, plaintiff thereafter had time to warn *(name of driver)* and failed to do so, and

Third, plaintiff was thereby negligent,[2] and

Fourth, such negligence[2] directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (1991 Revision)

1. This bracketed phrase may be added at defendant's option.

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

Caution: The standard of care applied to a passenger is only ordinary care, *Happy v. Blanton*, 303 S.W.2d 633, 639 (Mo. 1957), while drivers are required to use the highest degree of care. Lawyers must be careful to avoid an accidental misdirection when two completely different definitions of negligence apply in a single case. See MAI 11.08 submitting separate standards of care in a single instruction.

See Chapter 37.00 and Illustration 35.14 with regard to comparative fault generally.

Committee Comment (1969 New)

A. Caution: This instruction applies in a very limited area. It will be error to give it unless the evidence clearly supports its submission. In *Heifner v. Sparks*, 392 S.W.2d 1, 4 (Mo.App. 1965), the court said:

> It is common knowledge that passengers do largely rely upon the driver who has the exclusive control of a motor vehicle and under ordinary circumstances have the right so to do. As was said in *Ketcham v. Thomas*, 283 S.W.2d 642, 645: "In the

> absence of visible lack of caution of the driver or known imminence of danger, a guest may ordinarily rely upon a driver who has exclusive control of the vehicle, *Toburen v. Carter, supra, 273 S.W.2d 161 at page 164*, and it is a matter of common knowledge that under ordinary circumstances such occupants do largely rely upon the driver, who has the exclusive control and management of the vehicle, and who is exercising the required degree of care . . .."

B. In *Happy v. Blanton*, 303 S.W.2d 633, 638 (Mo. 1957), the Missouri Supreme Court held that it was error to instruct the jury that the passenger could not entrust herself to the driver and authorized the jury to find that failure of the passenger to keep a lookout and warn was negligent. The court said:

> The giving of this instruction was error. It requires that in the exercise of ordinary care, plaintiff, as a guest passenger, had to maintain a lookout and warn the driver of the automobile in which she was riding of dangerous situations she could have seen if she had maintained a lookout even though the driver of the automobile had been exercising the highest degree of care and plaintiff had no reason to believe he would not continue to do so. This is not a correct statement of the legal duty of a guest passenger in an automobile. Only mischief and confusion could result from a requirement that in the exercise of ordinary care every guest passenger must at all times be a "back seat driver."

C. This language has been quoted with approval in *Cunningham v. Pulver*, 327 S.W.2d 227 (Mo. 1959); *Brooks v. Mock*, 330 S.W.2d 759 (Mo. 1959); *Lamfers v. Licklider*, 332 S.W.2d 882 (Mo. 1960); *Stone v. Engler*, 349 S.W.2d 38 (Mo. 1961).

Research References

West's Key Number Digest
Automobiles ⚷246(2.1)

Annotations

In general 1
Modification 2

1. In general

Driver's not-in-MAI submission of passenger's contributory negligence in failing to request driver to reduce speed properly defined passenger's negligence as failure to use ordinary care. *Underwood v. Crosby*, 447 S.W.2d 566 (Mo.banc 1969).

2. Modification

MAI 32.03 modified to fit non-automotive case. *George v. Gross and Janes Co.*, 634 S.W.2d 579 (Mo.App. E.D. 1982).

32.03 [1991 Revision] Comparative Fault—Guest Passenger—Failure to Warn Driver of Dangers Which Were "Reasonably Apparent"

In your verdict you must assess a percentage of fault to plaintiff [, whether or not defendant was partly at fault,][1] if you believe:

First, plaintiff knew facts from which it was reasonably apparent that he was in immediate danger, and

Second, plaintiff had time to warn *(name of driver)* and failed to do so, and

Third, plaintiff was thereby negligent,[2] and

Fourth, such negligence[2] directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (1991 Revision)

1. This bracketed phrase may be added at defendant's option.

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

See Notes on Use for MAI 32.02 regarding the appropriate standard of care.

See Chapter 37 and Illustration 35.14 with regard to comparative fault generally.

Committee Comment (1969 New)

A. In *Toburen v. Carter*, 273 S.W.2d 161, 164 (Mo. 1954), and in other cases, the Missouri Supreme Court has talked about the passenger's duty to warn of dangers which are "known" and also those dangers which are "reasonably manifest."

B. In *Happy v. Blanton*, 303 S.W.2d 633, 638 (Mo. 1957), the Supreme Court held that a passenger has no duty to keep a lookout. "Reasonably manifest" is therefore something other than that which could have been discovered had the passenger been looking. The Committee concluded that the term "reasonably manifest" was intended to apply to a passenger who was looking, but who negligently failed to appreciate and warn of the danger of the condition seen. The Committee substituted the term "reasonably apparent" because it is more apt to be understood by lay jurors.

C. *See also* Committee Comment, MAI 32.02.

Research References

West's Key Number Digest
Automobiles 🔑246(2.1)

Annotations

1. In general

Instruction submitting plaintiff-passenger's contributory negligence in failing to warn defendant-driver of impending danger. *Worley v. Tucker Nevils, Inc.*, 503 S.W.2d 417 (Mo.banc 1973).

In an instruction submitting plaintiff guest-passenger's contributory negligence by failing to warn driver, it was error to submit *constructive* knowledge of danger. *Denny v. Mathieu*, 452 S.W.2d 114 (Mo.banc 1970).

Driver's not-in-MAI submission of passenger's contributory negligence in failing to request driver to reduce speed properly defined passenger's negligence as failure to use ordinary care. *Underwood v. Crosby*, 447 S.W.2d 566 (Mo.banc 1969).

32.04 [1991 Revision] Comparative Fault—Guest Passenger—Interfering With Driver

In your verdict you must assess a percentage of fault to plaintiff [, whether or not defendant was partly at fault,][1] if you believe:

First, plaintiff *(here insert act which was interference, such as, "diverted the attention of the driver")*, and

Second, plaintiff was thereby negligent,[2] and

Third, such negligence[2] directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (1991 Revision)

1. This bracketed phrase may be added at defendant's option.

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

See Notes on Use for MAI 32.02 regarding the appropriate standard of care.

See Chapter 37.00 and Illustration 35.14 with regard to comparative fault generally.

Committee Comment (1969 New)

A. See Committee Comment following MAI 32.02 and particularly the ***Caution*** therein.

B. See also, *Swinger v. Bell*, 373 S.W.2d 30 (Mo. 1963) where passenger allegedly diverted driver's attention and *La Fata v. Busalaki*, 291 S.W.2d 151 (Mo. 1956) where plaintiff sat so close to the driver as to impair driver's ability to steer the car.

Research References

West's Key Number Digest
Automobiles ⚷246(2.1)

32.05 [1991 Revision] Comparative Fault—Guest Passenger—Riding With Intoxicated Driver

In your verdict, you must assess a percentage of fault to plaintiff [, whether or not defendant was partly at fault,][1] if you believe:

First, at the time plaintiff [entered] [remained in][2] defendant's automobile, the defendant was intoxicated to the extent that defendant's driving ability was impaired, and

Second, plaintiff [entered] [remained in][2] defendant's automobile knowing that defendant was in such an intoxicated condition, and

Third, plaintiff was thereby negligent,[3] and

Fourth, such negligence[3] and the impaired driving ability of defendant directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (1991 Revision)

1. This bracketed phrase may be added at defendant's option.

2. Select appropriate term or phrase.

3. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

See Notes on Use for MAI 32.02 regarding the appropriate standard of care.

See Chapter 37.00 and Illustration 35.14 with regard to comparative fault generally.

Research References

West's Key Number Digest
Automobiles ⚷246(2.1)

Annotations

1. Modification

MAI 32.05, modified for submission of plaintiff's contributory negligence in riding in a car when he knew the driver intended to drive at an excessive speed, was erroneous in failing to submit defendant did in fact drive at excessive speed. *Waters v. Storms*, 501 S.W.2d 42 (Mo. 1973).

32.06 [1991 Revision] Comparative Fault—Malpractice

In your verdict you must assess a percentage of fault to plaintiff [, whether or not defendant was partly at fault,][1] if you believe:

First, plaintiff *(here set out act of contributory negligence complained of, such as, "failed to inform defendant of plaintiff's allergy to penicillin")*, and

Second, plaintiff was thereby negligent,[2] and

Third, such negligence[2] of plaintiff directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (1991 Revision)

1. This bracketed phrase may be added at defendant's option.

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

See Chapter 21.00 for instructions in actions against health care providers.

Committee Comment (1996 Revision)

A. Caution: This instruction should not be used where the patient's negligent acts merely aggravate the damages. In *Sanderson v. Holland*, 39 Mo.App. 233 (1889), the Court said: "While then it is a good defense, in an action for negligence, that the negligence of the plaintiff, *at the time of the injury,* contributed to produce the injury, yet 'it is no answer to an action, that the injured party, subsequent to the injury, was guilty of negligence which aggravated it. The negligence that will constitute a defense must have concurred in *producing* the injury.' "

B. *See also Steele v. Woods*, 327 S.W.2d 187 (Mo. 1959); *Van Vacter v. Hierholzer*, 865 S.W.2d 355 (Mo.App. W.D. 1993).

Research References

West's Key Number Digest
Negligence ⚷1746

Annotations

In general	1
Modification	2

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1. In general

Principle of comparative fault in failure of patient to follow physician's instructions should also apply to failure to follow hospital nurse's instructions; however, hospital's requested instruction concerning patient's failure to turn over to allow nurse to check his condition and to check a heating pad was properly refused in action involving burns from the heating pad where hospital offered no evidence that patient could turn and it was not shown whether patient had already been burned by the heating pad by the time of the nurse's request. *Hackathorn v. Lester E. Cox Medical Center*, 824 S.W.2d 472 (Mo.App. S.D. 1992).

Evidence in medical malpractice action did not justify physician's affirmative converse instruction, which effectively required the jury to find for the physician if it believed the patient had failed to tell physician about left-sided symptoms prior to her stroke; affirmative converse instruction must be supported by independent evidence and the facts submitted must be sufficient in law to defeat plaintiff's claim; facts that merely relate to negligence or possible comparative fault on the part of the plaintiff do not amount to matters to be submitted as an affirmative converse instruction. *Hiller v. Diestelhorst*, 820 S.W.2d 522 (Mo.App. E.D. 1991).

2. Modification

In malpractice action for damages to real estate, rather than personal injuries, defendant properly modified MAI 32.06 by deleting the words "injuries and" from the Paragraph Third clause reading ". . . the injuries and damages plaintiff may have sustained." *Siteman v. Woodward-Clyde & Associates, Inc.*, 503 S.W.2d 141 (Mo.App. 1973).

32.07 [1996 Withdrawn] Contributory Negligence—F.E.L.A.

Historical Note

(This instruction and its Notes on Use are withdrawn. *See* MAI 24.04(A) for submission of the affirmative defense of mitigation of damages in a F.E.L.A. case and MAI 24.04(B) for submission of the affirmative defense of contributory negligence in a F.E.L.A. case).

32.07(A) [2012 Withdrawn] Failure to Mitigate Damages—F.E.L.A.

Historical Note

(MAI 32.07(A) and its related Notes on Use and Committee Comment have been withdrawn. All instructions related to the Federal Employers' Liability Act have been collected in Chapter 24 of MAI-Civil. MAI 32.07(A) has been replaced by MAI 24.04(A) (2012 Revision)).

32.07(B) [2012 Withdrawn] Contributory Negligence—F.E.L.A.

Historical Note

(MAI 32.07(B) and its related Notes on Use and Committee Comment have been withdrawn. All instructions related to the Federal Employers' Liability Act have been collected in Chapter 24 of MAI-Civil. MAI 32.07(B) has been replaced by MAI 24.04(B) (2012 Revision)).

32.08 [1969 New] Battery Actions—Consent

Your verdict must be for defendant if you believe that plaintiff, by words or conduct, consented to the acts of defendant and the reasonable consequences thereof.

Committee Comment (1969 New)

A. *See* Restatement (Second) of Torts § 13 Comments g and h; § 18 Comment g; § 49 to § 60; § 69 (1965).

B. "It is very well–settled law that if a man voluntarily enters into a fight, not in self–defense, and gets the worst of it, he cannot recover damages, unless the beating given him by defendant was excessive or unreasonable." *Mitchell v. United Railways Co.*, 125 Mo.App. 1, 102 S.W. 661, 664 (1907). *Compare Jones v. Gale*, 22 Mo.App. 637 (Mo.App. 1886).

C. The courts of the United States are divided on the question of whether one who consents to a fight may recover. The Missouri Supreme Court has not yet spoken. *See* Note, 3 Mo.L.Rev. 44 (1938).

Research References

West's Key Number Digest
Assault and Battery ⚷43(2)

Legal Encyclopedias
C.J.S., Assault §§ 22, 61

32.09 [1969 New] Battery Actions—Ejecting Trespasser

Your verdict must be for defendant if you believe:

First, plaintiff [was][1] [remained][2] on defendant's premises without permission, and

Second, defendant by *(here insert defensive measures such as "striking" "shoving")* plaintiff, used only such force as was reasonable and necessary to remove plaintiff from the premises.

Notes on Use (1969 New)

1. This term should be used where plaintiff improperly entered defendant's premises.

2. This term should be used where plaintiff lawfully entered defendant's premises but declined to leave when requested to do so.

Committee Comment (2014 Revision)

A. Whether the trespasser was requested to leave before being forcibly ejected goes to the issue of what was reasonable and necessary and, therefore, is not set out as a separate element.

B. *See* Restatement (Second) of Torts §§ 77 to 83 (1965).

C. *See Hartman v. Hoernle*, 201 S.W. 911 (Mo.App. 1918); *Robbs v. Missouri Pac. Ry. Co.*, 210 Mo.App. 429, 242 S.W. 155 (1922); *Cunningham v. Reagan*, 273 S.W.2d 174 (Mo. 1954).

D. In 2007, the Missouri legislature enacted what is commonly referred to as the "castle doctrine." Those provisions are contained in amendments to §§ 563.011 *et seq.*, RSMo, and specifically § 563.031, RSMo. Section 563.031 was amended again in 2010.

Section 563.031, RSMo, sets forth the parameters for the use of force in self-defense and defense of others. Under certain circumstances, it authorizes the use of deadly force against one who unlawfully enters a dwelling place, residence, or vehicle. § 563.031.2(2). The defendant shall have the burden of injecting the issue of justification. § 563.031.5. The use of such deadly force must be "necessary to defend against what he or she reasonably believed was the use or imminent use of unlawful force." Section 563.031.5, RSMo.

Section 563.074, enacted in 2007, makes the use of deadly force under the circumstances allowed in chapter 563 an absolute defense to criminal or civil liability.

Research References

West's Key Number Digest
Assault and Battery ⚷43(2)

Legal Encyclopedias
C.J.S., Assault §§ 32, 61

Annotations

In general 1
Definition 2

1. In general

Commercial vehicle inspector at state truck weighing station had authority to request truck driver to leave the scale house and had right to use reasonable force to cause driver to leave when driver refused to do so, and thus, jury instruction to that effect was permissible in driver's action alleging intentional striking and shoving. *Billings v. Stanley*, 759 S.W.2d 277, 279 (Mo.App. W.D. 1988).

2. Definition

The "necessary means" to effect an arrest need not be defined. *Davis v. Moore*, 553 S.W.2d 559 (Mo.App. 1977).

32.10 [1969 New] Battery Actions—Resisting Invasion of Property

Your verdict must be for defendant if you believe:

First, plaintiff attempted to *(here describe unlawful act such as "enter defendant's home" or "take defendant's property")* when plaintiff had no right to do so, and

Second, defendant *(here describe defensive measures such as "struck plaintiff")* for the purpose of resisting plaintiff's attempt, and

Third, defendant used only such force as was reasonable and necessary to prevent plaintiff from *(here repeat act described in Paragraph First).*

Committee Comment (2016 Revision)

A. Restatement (Second) of Torts § 77 (1965) states the right to commit a battery in defense of property is conditioned upon defender's:

1. Reasonable belief that the intrusion can be prevented only by force;

2. Use of only reasonable force to protect the intrusion; and

3. First, making a request to the intruder to leave unless such a request is impractical.

B. It is the Committee's view that all three elements bear on the issue of the reasonableness of defender's action and, therefore, should be combined under the phrase ". . . used only such force as was reasonable and necessary . . ."

C. In *Hartman v. Hoernle*, 201 S.W. 911, 912 (Mo.App. 1918), the Court said: ". . . there can be no doubt that while defendant was entitled to resist the trespass upon his land, and the taking of his melons, he was not warranted in using more force than was necessary to eject the trespassers or to protect his property, and particularly not justified in unnecessarily assaulting plaintiff with a deadly weapon."

D. *See also Morgan v. Durfee*, 69 Mo. 469 (1879); Restatement (Second) of Torts §§ 77 to 82 (1965); 25 A.L.R. 537.

E. In 2007, the Missouri legislature enacted what is commonly referred to as the "castle doctrine." Those provisions are contained in amendments to §§ 563.011 *et seq.*, RSMo, and specifically § 563.031, RSMo. Section 563.031 was amended again in 2010.

Section 563.031, RSMo, sets forth the parameters for the use of force in self-defense and defense of others. Under certain circumstances, it authorizes the use of deadly force against one who unlawfully enters a dwelling place, residence, or vehicle. Section 563.031.2(2). The defendant shall have the burden of injecting the issue of justification. Section 563.031.5. The use of such deadly force must be "necessary to defend against what he or she reasonably believed was the use or imminent use of unlawful force." Section 563.031.5, RSMo).

Section 563.074, enacted in 2007, makes the use of deadly force under the circumstances allowed in chapter 563 an absolute defense to criminal or civil liability.

F. See *Barkley v. McKeever Enterprises*, 456 S.W.3d 829 (Mo.banc 2015), for a further discussion of the merchant's privilege as an available affirmative defense against a battery claim and for a discussion of reasonable force under § 537.125, RSMo.

Research References

West's Key Number Digest
Assault and Battery ⚿43(2)

32.11 [1998 Revision] Battery Actions—Self-Defense

Your verdict must be for defendant if you believe:

First, defendant had reasonable cause to apprehend and did apprehend [great bodily harm from plaintiff] [bodily harm from plaintiff] [offensive contact from plaintiff][1] *(if to some other person such as defendant's wife, insert "to defendant's wife")*, and

Second, defendant did not create the situation that caused defendant's apprehension, and

Third, the *(describe act of defendant, such as "striking of plaintiff")*, was in defense against this apprehended [great bodily harm] [bodily harm] [offensive contact][1] and

Fourth, defendant used only such force as was reasonable and necessary.

Notes on Use (1981 Revision)

1. Select the phrase appropriate to the force used.

Committee Comment (2014 Revision)

A. Self-defense must be affirmatively pleaded or it is waived. *Atchison v. Procise*, 24 S.W.2d 187 (Mo.App. 1930).

B. "The law does not permit a person voluntarily to seek or invite a combat, or to put himself in the way of being assaulted, so that when hard pressed he may have a pretext for injuring his assailant . . . if the necessity for defending himself was of defendant's own creation, it did not operate to excuse him. The self-defense instructions given on his behalf should have been qualified accordingly." *Lehman v. Lambert*, 329 Mo. 1147, 49 S.W.2d 65, 68 (1932).

C. *See also Lawrence v. Womack*, 23 S.W.2d 190 (Mo.App. 1930); *O'Shea v. Opp*, 341 Mo. 1042, 111 S.W.2d 40 (1937); *Duncan v. Moore*, 219 Mo.App. 374, 271 S.W. 847 (1925).

D. The defendant must have "reasonable cause" for believing that defendant is in danger. *Daggs v. St. Louis—S.F. Ry. Co.*, 326 Mo. 555, 31 S.W.2d 769 (1930), appeal following rehearing, 51 S.W.2d 164 (Mo.App. 1932).

E. The act of self-defense must be commensurate with the apprehension of harm. *See Martin v. Yeoham*, 419 S.W.2d 937 (Mo.App. 1967).

F. See generally Restatement (Second) of Torts §§ 63 to 71 (1965). As to protection of third parties, see § 76.

G. In 2007, the Missouri legislature enacted what is commonly referred to as the "castle doctrine." Those provisions are contained in amendments to §§ 563.011 *et seq.*, RSMo, and specifically § 563.031, RSMo. Section 563.031 was amended again in 2010.

Section 563.031, RSMo, sets forth the parameters for the use of force in self-defense and defense of others. Under certain circumstances, it authorizes the use of deadly force against one who unlawfully enters a dwelling place, residence, or vehicle. Section 563.031.2(2). The defendant shall have the burden of injecting the issue of justification. Section 563.031.5. The use of such deadly force must be "necessary to defend against what he or she reasonably believed was the use or imminent use of unlawful force." § 563.031.5, RSMo.

Section 563.074, RSMo, enacted in 2007 makes the use of deadly force under the circumstances allowed in chapter 563 an absolute defense to criminal or civil liability.

Research References

West's Key Number Digest
Assault and Battery ⚷43(2)

Legal Encyclopedias
C.J.S., Assault §§ 25, 61

Annotations

1. Modification

Where defendant *shot* plaintiff, Paragraph First of his self-defense instruction should be modified to require a finding defendant believed he was in imminent danger of death or great bodily harm. *Martin v. Yeoham*, 419 S.W.2d 937 (Mo.App. 1967).

32.12 [1969 New] Libel and Slander—Truth

Your verdict must be for defendant if you believe that the statement *(here repeat statement contained in plaintiff's verdict directing instruction)* was substantially true.

Committee Comment (1988 Revision)

A. Mo.Const. Art. I, § 8, states: ". . . in all suits and prosecutions for libel or slander the truth thereof may be given in evidence; and in suits and prosecutions for libel the jury, under the direction of the court, shall determine the law and the facts."

B. In *Kleinschmidt v. Johnson*, 183 S.W.2d 82, 86 (Mo. 1944), the Court said: "The [trial] court instructed the jury to find for the defendants if, inter alia, 'you find from the evidence that the article, in substance, was true, . . . ' It was not necessary that the precise facts stated in the alleged defamatory article should be found to be literally true. Slight inaccuracies of expression are immaterial if the defamatory charge is true in substance . . .. The term 'in substance' is not such as would require a definition."

C. See verdict directing instructions at MAI 23.06(1) and MAI 23.10(1).

Research References

West's Key Number Digest
Libel and Slander 🔑124(3)

Annotations

1. In general

Defensive instructions in libel case must conform to MAI or the philosophy of MAI. *Skain v. Weldon*, 422 S.W.2d 271 (Mo. 1967).

Defendant's instructions in libel case on "fair comment" about a public official condemned as (1) abstract statements, (2) argumentative, and (3) "lecturing type" instructions. Instructions not justified by the fact they were quoted from Supreme Court opinions. *Skain v. Weldon*, 422 S.W.2d 271 (Mo. 1967).

Disparate testimony re truth of statement warranted giving of MAI 32.12. *Ramacciotti v. Zinn*, 550 S.W.2d 217 (Mo.App. 1977).

32.13 [1978 Revision] False Imprisonment—Shoplifting

Your verdict must be for defendant if you believe:

First, defendant was engaged in mercantile trade, and

Second, defendant had reasonable cause to believe that plaintiff wrongfully had taken or was taking merchandise or money, and[1]

Third, plaintiff's restraint was made in a reasonable manner and for a reasonable length of time for the purpose of investigation.

Notes on Use (1978 New)

1. If the defendant wishes to submit upon the evidentiary presumption of reasonable cause for detention arising from evidence of willful concealment of merchandise provided for in § 537.125.3, RSMo, the following alternative Paragraph Second may be substituted:

"Second, plaintiff willfully concealed (describe concealed merchandise, such as 'the watch' and state place of concealment such as 'in his pocket'), and"

Committee Comment (2016 Revision)

A. This instruction submits the defense provided for in § 537.125, RSMo. See Annot., 47 A.L.R.3d 998 (1973), for cases construing similar statutes. See *Schwane v. The Kroger Company*, 480 S.W.2d 113 (Mo.App. 1972), construing the statutory presumption for willful concealment.

B. For the common law defense, see *Teel v. May Dept. Stores Co.*, 348 Mo. 696, 155 S.W.2d 74 (1941), citing Restatement (First) of Torts §§ 77 to 80 (1934), appeal following rehearing, 352 Mo. 127, 176 S.W.2d 440 (1943). The case is discussed in 8 Mo.L.Rev. 336 (1943) and 14 Mo.Bar J. 310 (1943).

C. See *Barkley v. McKeever Enterprises*, 456 S.W.3d 829 (Mo.banc 2015), for a further discussion of the merchant's privilege as an available affirmative defense against a battery claim and for a discussion of reasonable force under § 537.125, RSMo.

Research References

West's Key Number Digest
False Imprisonment ⚷40

Annotations

In general 1

Justification 3
Modification 2

1. In general

In an action for false arrest trial court properly refused defendants' affirmative defense instruction, MAI 32.13, where defendants were attempting to use plaintiff's evidence to support a theory inconsistent with their own theory of defense. *Stewart v. K-Mart Corp.*, 747 S.W.2d 205 (Mo.App. E.D. 1988).

MAI 23.04 (verdict director) and 28.10 [Now 32.13] (affirmative defense) properly submitted case of customer's arrest by off-duty policeman working as defendant's security officer. *Nelson v. R.H. Macy & Co.*, 434 S.W.2d 767 (Mo.App. 1968).

2. Modification

Modification of Paragraph Second improperly added the clause ". . . may have committed . . .." *Bergel v. Kassebaum*, 577 S.W.2d 863 (Mo.App. 1978).

3. Justification

Even if jury instruction providing affirmative defense of justification for arrest in false imprisonment cases for a shopkeeper as to a shoplifter was improperly submitted to jury, patron was not prejudiced by its submission, in action for false imprisonment and malicious prosecution; though it was police and not store manager who detained her, patron was not restrained against her will, and she voluntarily consented to the search of her bags and vehicle. *Rankin v. Venator Group Retail, Inc.*, 93 S.W.3d 814 (Mo.App. E.D. 2002).

Jury instruction providing affirmative defense of justification for arrest in false imprisonment cases for a shopkeeper as to a shoplifter was the applicable pattern instruction in action by patron against sporting goods store for false arrest and malicious prosecution, though it was police, rather than store manager herself, who allegedly restrained patron; pattern instruction was based on probable cause to believe that a person had committed a wrongful taking of merchandise and applied even if store manager merely instigated false imprisonment. *Rankin v. Venator Group Retail, Inc.*, 93 S.W.3d 814 (Mo.App. E.D. 2002).

32.14 [1969 New] Payment for Services Furnished Decedent

Your verdict must be for defendant if you believe that plaintiff has already been paid for all services furnished to *(name of decedent).*

Committee Comment (1969 New)

A. Payment is an affirmative defense, Rule 55.08.

Research References

West's Key Number Digest
Executors and Administrators ⚷451(3)

Annotations

1. In general

Patient and patient's husband were not entitled to affirmative defense instruction of payment in hospital's action to collect for unpaid medical bills, where there was no evidence that full payment had been made. *St. Francis Medical Center v. Sheffer*, 892 S.W.2d 394 (Mo.App. E.D. 1995).

32.15 [1969 New] Gratuitous Furnishing of Services

Your verdict must be for defendant if you believe that at the time the services were furnished to *(name of decedent)* plaintiff did not intend to make a charge for the services.

Committee Comment (1969 New)

A. See General Comment at MAI 28.00.

B. Gratuitous furnishing of services is an affirmative defense. In *Lauf v. Wiegersen*, 17 S.W.2d 369, 371 (Mo.App. 1929), the Court said:

> The rule is that, where the family relationship does not exist, the burden is upon the party who accepts services of the character shown in this case to prove that they were rendered gratuitously . . .

C. This instruction is intended for use in conversing actions by strangers. Where suit is brought by one in a family relationship, claimant will have to prove a contract and such would be the issue normally conversed.

Research References

West's Key Number Digest
Executors and Administrators ⚷451(3)

Annotations

1. In general

In quantum meruit claim for services rendered to unmarried cohabitant where status as "stranger" was in dispute, Court erred by refusing to give defendant's requested instruction based on MAI 32.15 in addition to MAI 32.16. *Kirk v. Estate of Garr*, 732 S.W.2d 255 (Mo.App. S.D. 1987).

32.16 [1969 New] Family Relationship

Your verdict must be for defendant if you believe that at the time the services were furnished to *(name of decedent)* there existed between the plaintiff and *(name of decedent)* such a relationship that there was a natural or moral obligation to support and care for each other.

Notes on Use (1969 New)

To be used as a defense to MAI 28.04 *only.*

Committee Comment (1969 New)

A. *Smith v. Estate of Sypret*, 421 S.W.2d 9, 14 (Mo. 1967), states, ". . . to constitute a 'family' there must be (1) a social status, (2) there must be a head who has a right, at least in a limited way, to direct and control those gathered into the household, and (3) this head must be obligated either legally or morally to support the other members, and (4) there must be a corresponding state of at least partial dependence of the other members for this support."

Research References

West's Key Number Digest
Executors and Administrators ⚷451(3)

Annotations

1. In general

In quantum meruit claim for services rendered to unmarried cohabitant where status as "stranger" was in dispute, Court erred by refusing to give defendant's requested instruction based on MAI 32.15 in addition to MAI 32.16. *Kirk v. Estate of Garr*, 732 S.W.2d 255 (Mo.App. S.D. 1987).

Where plaintiff went to jury on MAI 28.02, *Implied Contract,* it was error to give defendant's MAI 32.16, appropriate only where plaintiff submits on quantum meruit. *Sturgeon v. Estate of Wideman*, 631 S.W.2d 55 (Mo.App. E.D. 1981).

32.17 [2012 Withdrawn] Will Contest—Fraud Invalidating Will

Historical Note

(MAI 32.17 and its related Notes on Use have been withdrawn. All instructions and illustrations related to Will Contests have been collected in Chapter 15 of MAI-Civil. MAI 32.17 has been replaced by MAI 15.07 (2012 Revision)).

32.18 [2012 Withdrawn] Will Contest—Undue Influence

Historical Note

(MAI 32.18 and its related Notes on Use have been withdrawn. All instructions and illustrations related to Will Contests have been collected in Chapter 15 of MAI-Civil. MAI 32.18 has been replaced by MAI 15.08 (2012 Revision)).

32.19 [1981 Revision] Life Insurance—Misrepresentation of Material Fact—Not Warranted

Your verdict must be for defendant if you believe:

First, decedent represented in the application for the policy that *(here insert the statement, such as "decedent had not previously had heart trouble")*, and

Second, decedent intended that defendant rely upon the representation in issuing the policy, and

Third, the representation was false, and

Fourth, decedent [knew that the representation was false] [did not know whether the representation was true or false],[1] and

Fifth, defendant relied on the representation in issuing the policy, and

Sixth, such *(here insert a description of the matter referred to in the representation)* contributed to the death of decedent.

Notes on Use (1981 New)

1. Select the appropriate phrase.

Caution: This instruction contains the elements of fraud which must be submitted if the policy application does not warrant that the matters referred to in the application are true. If it does, use MAI 32.20.

Committee Comment (1981 Revision)

A. See the Committee Comment following MAI 32.20 pertaining to the basis for the two defenses involving misrepresentation.

B. Section 376.580, RSMo, is applicable to both defenses. It provides:

Misrepresentation. No misrepresentation made in obtaining

> or securing a policy of insurance on the life or lives of any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury.

Research References

West's Key Number Digest
Insurance ⚷3554, 3579

Annotations

1. In general

Any error in verdict director omitting element that policy was in force was cured by reference to instruction on affirmative defense of misrepresentation. *Crewse v. Shelter Mut. Ins. Co.*, 706 S.W.2d 35 (Mo.App. W.D. 1985).

32.20 [1981 Revision] Life Insurance—Breach of Warranty

Your verdict must be for defendant if you believe:

First, decedent represented in the application for the policy that *(here insert the statement, such as "decedent had not previously had heart trouble")*, and

Second, the representation was false, and

Third, such *(here insert a description of the matter referred to in the application)* contributed to the death of decedent.

Notes on Use (1969 New)

Caution: This instruction is appropriate only "where material representations made in an application for a policy of life insurance are warranted to be true, or the policy is conditioned upon the truth of the representations, or provides that the falsity of the representations shall avoid the policy." See Committee Comment which follows.

Committee Comment (1969 New)

A. Where an action is brought to recover benefits under a life insurance policy, two distinct defenses may be available to the insurer. Insurer may defend on breach of a condition warranted to be true, and it may defend on the basis of misrepresentation of a material fact. When the defense is breach of a condition warranted to be true, the insurer may avoid liability without showing that the insured was guilty of fraud because the policy is *conditioned* upon the truth of the warranty or representation. To the contrary, the element of fraud must be established and submitted when the defense is one of false representation where no such warranty or policy condition exists.

B. The rule has been explained in *Dixon v. Business Men's Assurance Co.*, 365 Mo. 580, 285 S.W.2d 619, 625 (1955), as follows:

> The rule in this state, as we understand it, is that where material representations made in an application for a policy of life insurance are warranted to be true, or the policy is conditioned upon the truth of the representations, or provides that the falsity of the representations shall avoid the policy, then the representations, if in fact untrue, will avoid the policy, though the representations

> were innocently made. This is so because such is the contract. The insurer is entitled to stand on the contract as written, and the innocence of the insured in making the representations is a matter of no concern. But where there is no such warranty or provision in the policy a misrepresentation, in order to avoid the policy must have been fraudulently made. This is the rule applicable to contracts generally, and we see no reason why an exception should be made with respect to insurance contracts . . ..
>
> Defendant invokes the rule, announced in the decisions, that the statute, § 5732, R.S.1929, Mo.St.Ann. § 5732, p. 4373 [§ 376.580, RSMo], providing that no misrepresentations made in obtaining or securing a policy of life insurance shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, applies alike to warranties and representations, and draws no distinction between innocent and fraudulent misrepresentations. We are unable to see how this rule helps defendant. Obviously, the statute does not disturb the law of insurance contracts except in that it avoids defenses founded on misrepresentations when the matter misrepresented does not contribute to the contingency or event on which the policy is to become due and payable. The purpose of the statute is to aid, not to hinder, the insured—to limit, not to extend, the rights of the insurer. *Houston v. Metropolitan Life Ins. Co.*, 232 Mo.App. 195, 205, 97 S.W.2d 856, 860 (1936).

C. A similar requirement applicable to accident and health policies is in § 376.783.3, RSMo, which requires that false statements in policy applications cannot bar recovery unless such statements are material to the hazard assumed, or the acceptance of the risk.

Research References

West's Key Number Digest
Insurance ⚷3554, 3579

Annotations

1. In general

Instruction is only applicable when coverage application answers are warranted to be true, or policy is conditioned on truthful answers. *Barrera v. Individual Assurance Co.*, 829 S.W.2d 14 (Mo.App. W.D. 1992).

32.21 [1978 Revision] Release

Your verdict must be for defendant if you believe:

First, plaintiff signed and delivered the release to defendant, and

Second, plaintiff was paid $________[1] for such release.

* [unless you find for plaintiff under Instruction Number ________ *(here insert number of plaintiff's instruction which hypothesizes that the release is not effective, such as MAI 32.22)*].

Notes on Use (1978 New)

1. If plaintiff's consideration was something other than money, modify Paragraph Second to describe the consideration received.

This instruction is to be given only when there is a disputed issue as to whether plaintiff gave a release. If the plaintiff disputes executing the release and claims in the alternative that if a release was given, it was obtained by fraud, then this instruction should be given along with the bracketed phrase shown. If the plaintiff admits plaintiff gave the release for consideration but claims that it was obtained by fraud, then neither this instruction nor MAI 32.22 should be given. The issues which would otherwise be given in MAI 32.22 should be added to plaintiff's verdict director. *See* Notes on Use, MAI 32.22.

* Add in the event plaintiff submits an avoidance of release.

Research References

West's Key Number Digest
Products Liability ⚷433

Annotations

1. In general

Release instruction properly refused where plaintiff's evidence was that release given was for a different, prior injury. *Woodford v. Illinois Central Gulf R. Co.*, 518 S.W.2d 712 (Mo.App. 1974).

32.22 [1978 Revision] Avoidance of Affirmative Defense—Release Obtained by Fraud

Your finding must be for plaintiff on the defense of release submitted in Instruction Number ______ *(here insert number of the affirmative defense instruction which submits release)* if you believe:

First, defendant represented *(here insert the factual representation allegedly made in connection with the release)*, and

Second, the representation was false, and

Third, [defendant knew it was false] [or] [defendant did not know whether it was true or false],[1] and

Fourth, the representation was material to the execution of the release by plaintiff, and

Fifth, plaintiff relied on the representation in executing the release.

Notes on Use (1978 Revision)

1. Plaintiff may use either or both bracketed phrases at their option. If both phrases are used they should be submitted in the disjunctive.

This instruction is to be given only when the plaintiff disputes executing the release and claims in the alternative that if a release was given, it was obtained by fraud. If the plaintiff admits that plaintiff gave the release for consideration but claims that it was obtained by fraud, then neither this instruction nor MAI 32.21 should be given. The issues which would otherwise be submitted by this instruction should be added to plaintiff's verdict director.

Committee Comment (1969 New)

A. See *Southwest Pump & Machinery Co. v. Jones*, 87 F.2d 879 (8th Cir. 1937); *Pevesdorf v. Union Electric Light & Power Co.*, 333 Mo. 1155, 64 S.W.2d 939 (1933).

Research References

West's Key Number Digest
Products Liability ⚷433

Annotations

1. In general

Where contested issues of right to rely and element of intent were omitted from plaintiff's verdict director, patterned after MAI 32.22, new trial was required. *Bockover v. Stemmerman*, 708 S.W.2d 179 (Mo.App. W.D. 1986).

32.23 [1978 Revision] Product Liability—Strict Liability—Contributory Fault

Your verdict must be for defendant if you believe:

First, when the *(describe product)* was used, plaintiff knew of the danger as submitted in Instruction[s] Number ______ [and ______][1] and appreciated the danger of its use, and

Second, plaintiff's exposure to such danger was voluntary and unreasonable, and

Third, such conduct directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (1978 Revision)

1. If plaintiff submits under both MAI 25.04 (Strict Liability-Product Defect) and MAI 25.05 (Strict Liability-Failure to Warn) use the bracket so that this instruction will refer to both verdict directors; the defense submitted under this instruction is a defense to both theories of recovery.

Caution: This instruction must be modified if plaintiff submits more than one danger.

Committee Comment (1991 Revision)

A. *See Keener v. Dayton Electric Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969) and *Williams v. Ford Motor Co.*, 454 S.W.2d 611, 617–620 (Mo.App. 1970).

B. In *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo.banc 1986), the Supreme Court of Missouri held that comparative fault does not apply to the plaintiff's claim based on strict liability in tort but that MAI 32.23 may be given as a complete defense to a strict liability claim where supported by adequate evidence.

C. Caution: Changes in tort law effected by the provisions of § 537.765, RSMo, applicable to the doctrines of comparative fault and strict liability, and the abolition of contributory fault as a complete defense, apply to causes of action accruing after July 1, 1987. If § 537.765, is applicable, see Chapter 37.00 for submission of comparative fault.

Research References

West's Key Number Digest
Products Liability ⚷421, 433

Annotations

1. In general

There was sufficient evidence to warrant giving of instruction on product user's contributory fault in product liability case arising out of explosion caused by spark created by air compressor which ignited gas fumes; there was evidence that product user engaged in behavior that he knew could cause explosion, including evidence that product user was aware of danger of an accumulation of gas fumes, that any spark could cause fumes to explode, and that electrical products give off sparks. *Arnold v. Ingersoll-Rand Co.*, 834 S.W.2d 192 (Mo.banc 1992).

Jury instruction was not proper submission of "contributory fault" in products liability case, where it introduced negligence concepts. *Barnes v. Tools & Machinery Builders, Inc.*, 715 S.W.2d 518 (Mo.banc 1986).

Comparative fault does not apply in a strict products liability case, but the giving of MAI 32.23 is not precluded in the appropriate case. *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo.banc 1986).

Action for *negligent* repair of furnace was not a strict liability case, so defendant was not entitled to a contributory fault instruction. *Portman v. Sinclair Oil Co.*, 518 S.W.2d 625 (Mo. 1975).

Jury question existed as to whether asbestos insulator, who brought products liability action against successor to asbestos manufacturer, was guilty of contributory fault with respect to his asbestosis, even though insulator continued to work with asbestos after learning that asbestosis was possible from exposure to asbestos and failed to wear mask or respirator, where insulator had already worked in asbestos industry for 20 years, and there was no evidence of insulator's understanding of level of danger, nature of danger, or who was at risk. *Angotti v. Celotex Corp.*, 812 S.W.2d 742 (Mo.App. W.D. 1991).

Defense of contributory fault as a complete bar to recovery could be submitted to jury in products liability action against manufacturer of silage wagon by farm worker who lost his arm after his clothing became caught in wagon, given farm worker's extensive familiarity with operations of the wagon and his awareness of danger poised by rotating blades when he tried to repair broken chain while power was engaged. *Harper v. NAMCO, Inc.*, 765 S.W.2d 634, 637–38 (Mo.App. W.D. 1989).

A combine operator's contributory negligence was not a defense in a strict products liability case against a manufacturer, distributor, and retailer. However, contributory fault, MAI 32.23, could be submitted as a complete defense. *Love v. Deere & Co.*, 720 S.W.2d 786 (Mo.App. W.D. 1986).

32.24 [1978 New] Insurance Policy Defense

Your verdict must be for defendant if you believe:

First, plaintiff *(describe violated policy condition, e.g., "failed to submit a proof of loss to defendant within the time prescribed by the policy")*, and

Second, defendant was thereby prejudiced.

Committee Comment (1978 New)

A. This instruction should not be given unless there is evidence of a material breach of a policy condition. *Greer v. Zurich Insurance Co.*, 441 S.W.2d 15 (Mo. 1969).

Research References

West's Key Number Digest
Insurance ⚷3554, 3579

Annotations

1. In general

Instruction requiring verdict for insurer if insured's violation of policy condition prejudices insurer is inapplicable when condition is notice provision and delay in notice was due to insured's incapacity; when delay is due to incapacity, prejudice is only one factor in determination of reasonableness of delay. *Tresner v. State Farm Ins. Co.*, 913 S.W.2d 7 (Mo.banc 1995).

Insurer bears burden of proof on affirmative defense that insured failed to comply with policy condition. *Nichols v. Preferred Risk Group*, 44 S.W.3d 886 (Mo.App. S.D. 2001).

32.25 [1981 New] Warranty—Exclusion of Implied Warranty Under UCC

Your verdict must be for defendant if you believe [either]: *(insert one or more[1] of the following)*

> defendant [here set out or describe the statement or writing relied on by defendant to exclude the warranty],[2] or
>
> defendant sold *(describe the article or product)* "as is",[3] or
>
> the warranty was excluded by the course of dealings[4] between plaintiff and defendant, or
>
> [plaintiff examined and accepted the goods] [plaintiff refused to examine the goods][5] and the failure of the goods to conform was the type of defect which an examination by plaintiff ought to have revealed.

Notes on Use (1981 New)

1. If more than one basis for the exclusion is submitted, they must be submitted in the disjunctive.

2. The statement disclaiming the implied warranty of merchantability must contain the word merchantability. § 400.2-316(2), RSMo. In the case of a writing, whether a disclaimer is "conspicuous" is a matter for the court to decide. § 400.1-201(10), RSMo.

3. See § 400.2-316(3)(a), RSMo, for other phrases which can operate to exclude all implied warranties.

4. See § 400.2-316(3)(c), RSMo, for alternate methods of excluding all implied warranties.

5. Select the appropriate phrase.

Committee Comment (1981 New)

See Uniform Commercial Code Comment to § 400.2-316, RSMo.

Research References

West's Key Number Digest
Products Liability ⚷433

32.26 [1990 New] Conversion—Consent

Your verdict must be for defendant if you believe that plaintiff by words or conduct permitted defendant to take possession of *(here describe property).*

Notes on Use (1990 New)

This instruction may only be used as an affirmative defense to a conversion by a wrongful taking as submitted in MAI 23.12(1).

Research References

West's Key Number Digest
Trover and Conversion 🔑67

32.27 [1990 New] Conversion—Abandonment

Your verdict must be for defendant if you believe:

First, plaintiff *(here describe act(s) claimed to constitute abandonment such as "left the property in the apartment after the lease expired")*, and

Second, plaintiff intended to abandon *(here describe the property)*.

Notes on Use (1990 New)

Caution: Where a motor vehicle or trailer is involved, *see,* § 301.210, RSMo, and *Jones v. Ford Motor Credit Company*, 607 S.W.2d 179 (Mo.App. E.D. 1980), in connection with submitting affirmative defense of abandonment. This may apply to other property with statutory title requirements.

This instruction may be used as an affirmative defense to any type of conversion case, see MAI 23.12(1) and 23.12(2).

Research References

West's Key Number Digest
Trover and Conversion 🔑67

32.28 [1995 Revision] Comparative Fault—Invitee Injured—Failure to Keep a Lookout

In your verdict you must assess a percentage of fault to plaintiff [whether or not defendant was partly at fault][1] if you believe:

First, plaintiff knew or by using ordinary care[2] could have known that there was *(here describe substance on floor that caused the fall)* on the floor of defendant's store and as a result the floor was not reasonably safe, and

Second, plaintiff failed to use ordinary care[2] to keep a careful lookout[3], and

Third, such failure directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (1989 New)

1. The bracketed phrase may be used at defendant's option.

2. The phrase "ordinary care" must be defined. See definition at MAI 11.05.

3. A "lookout" submission may not be appropriate in all cases. If supported by the evidence and the applicable law, another appropriate act or omission may be submitted.

Committee Comment (1995 Revision)

A. For discussion of a possessor's duty, obviousness of a dangerous condition, and comparative fault, see *Harris v. Niehaus*, 857 S.W.2d 222 (Mo.banc 1993); *Patton v. May Dept. Stores Co.*, 762 S.W.2d 38 (Mo.banc 1988); *Cox v. J.C. Penney Co., Inc.*, 741 S.W.2d 28 (Mo.banc 1987); *Hefele v. National Super Markets, Inc.*, 748 S.W.2d 800 (Mo.App. E.D. 1988); and §§ 343 and 343A(1), Restatement (Second) of Torts (1965).

B. This instruction has not been formulated to submit plaintiff's fault based on conduct other than that associated with the failure to discover a dangerous condition.

C. The 1995 Revision to this instruction changed the phrase "should have known" to "could have known" on the issue of constructive notice.

Some MAI instructions had used one of the phrases and other instructions had used the other phrase. Questions had arisen as to whether "should have known" imposed a higher burden than "could have known". *See Benton v. City of Rolla*, 872 S.W.2d 882 (Mo.App. S.D. 1994); *Burrell v. Mayfair-Lennox Hotels, Inc.*, 442 S.W.2d 47 (Mo. 1969). For consistency, the Committee has opted to use the phrase "could have known" to the extent possible in the context of constructive notice. Other instructions, such as MAI 10.07, Paragraph Second of MAI 22.01, MAI 22.07, and MAI 25.10(A), continue to use the phrase "should have known" because that phrase is part of a "knew or had reason to know" standard as explained in the Committee Comments to those instructions.

Research References

West's Key Number Digest
Negligence 🔑1746

32.29 [2002 New] Failure to Mitigate Damages

If you find in favor of plaintiff, you must find that plaintiff failed to mitigate damages if you believe:

First, plaintiff *(insert act sufficient to constitute failure to mitigate, such as "failed to return to work")*, and

Second, plaintiff thereby failed to use ordinary care,[1] and[2]

Third, plaintiff thereby sustained damage that would not have occurred otherwise.

Notes on Use (2002 New)

1. The term "ordinary care" must be defined. See definitions in Chapter 11.00.

2. If more than one specification of failure to mitigate damages is appropriately submitted, modify Paragraph First to submit such specifications in the disjunctive and modify Paragraph Second to read:

> "Second, plaintiff, in one or more of the respects submitted in Paragraph First, thereby failed to use ordinary care, and".

Committee Comment (2002 New)

A. In the past, varied approaches have been suggested for the manner of instructing on the issue of mitigation of damages. For example, the plurality opinion in *Love v. Park Lane Medical Center*, 737 S.W.2d 720 (Mo.banc 1987), suggested using a comparative fault approach. The product liability statute, § 537.765, RSMo, also could be read to suggest a comparative fault approach. *Tillman v. Supreme Exp. & Transfer, Inc.*, 920 S.W.2d 552 (Mo.App. E.D. 1996), seemed to indicate that MAI 6.01 is the correct approach, although it also observed that MAI 6.01 is limited to wrongful death cases.

B. In fact, rather than the doctrine of avoidable consequences, MAI 6.01 submits a completely different type of mitigation (mitigating circumstances attendant upon the fatal injury in a wrongful death case pursuant to § 537.090, RSMo). *Tillman* also rejected the comparative fault approach to mitigation of damages. In order to avoid potential inconsistencies in alternative methods of submission (comparative fault approach in some cases, the FELA approach in other cases, and yet other possible approaches in other cases), the Committee has concluded that it is best to adopt a uniform approach to the submission of the doctrine of mitigation of damages in all cases as reflected in MAI 32.29 and the revision of MAI 4.01. This approach is both legally and logically correct and consistent with the approach already taken in FELA cases (See MAI 24.04(A) and MAI 24.07). It is also in compliance with the mandate of § 537.765 that failure to mitigate damages "shall diminish proportionately the amount awarded as compensatory damages . . ."; thus, the method of submission of mitigation of damages in a product liability case should also utilize the approach taken in MAI 32.29 and MAI 4.01.

Research References

West's Key Number Digest
Negligence ⚿1744

33.00

CONVERSE INSTRUCTIONS

33.01 General Comment
33.02 Instructions Conversing Verdict Directing 17.01 Using "If You Do Not Believe" Introduction [Withdrawn 1980]
33.03 Instructions Conversing Verdict Directing 17.01 Using "Unless You Believe" Introduction
33.04 Instructions Conversing Verdict Directing 17.02 Using "Unless You Believe" Introduction
33.05 Conversing Verdict Directing Using Affirmative Converse—"If You Believe" Introduction [Withdrawn 1988]
33.05(1) Conversing Verdict Directing Instruction Using Affirmative Converse—"If You Believe" Introduction
33.05(2) Affirmative Converse—Legal Justification for Negligence Per Se
33.06 Humanitarian Converse Instructions [Withdrawn 1990]
33.07 Issue of Sound and Disposing Mind and Memory [Withdrawn 1980]
33.08 Issue of Furnishing Services and Agreement to Pay [Withdrawn 1980]
33.09 Issue of Implied Agreement to Pay [Withdrawn 1980]
33.10 Issue of Plaintiff Furnishing Services [Withdrawn 1980]
33.11 Issue of Express Contract [Withdrawn 1980]
33.12 Conversing Issue of Accepting Benefits of Services [Withdrawn 1980]
33.13 General Converse [Withdrawn 1980]
33.14 Conversing Verdict Directing 22.02, 22.03, 22.04 and 22.05. Using "If You Do Not Believe" Introduction [Withdrawn 1980]
33.15 Instructions Conversing Verdict Directing 22.02, 22.03, 22.04 and 22.05 Using "Unless You Believe" Introduction
33.16 Conversing Exemplary Damages

Research References

West's Key Number Digest
Trial 🔑203(3)

A.L.R. Library
West's A.L.R. Digest, Trial 🔑203(3)

Legal Encyclopedias
C.J.S., Trial § 652

33.01 [2012 Revision] General Comment

A. Cases prior to MAI recognized that a defendant is entitled to a converse of plaintiff's verdict directing instruction. *Frazier v. Ford Motor Company*, 365 Mo. 62, 276 S.W.2d 95 (1955).

B. A true converse instruction does not need testimony to support it "because, absent a judicial admission, . . . the credibility of the witnesses giving oral testimony establishing the affirmative remains for the jury." *Kimbrough v. Chervitz*, 353 Mo. 1154, 186 S.W.2d 461, 464 (1945).

C. For an extensive discussion of Converse Instructions under MAI, see Note, 42 Mo.L.Rev. 175 (1977).

D. Verdict directing instructions of plaintiffs *(and cross claimants and counterclaimants)* may be conversed in one of the following two ways: a true converse or an affirmative converse.

True Converse

E. A true converse instruction begins with: "Your verdict must be for defendant unless you believe" followed by one or more propositions submitted by the verdict directing instruction and in substantially the same language used in the verdict directing instruction. It is important to understand that the converse instructions shown in Illustrations 33.03, 33.04, and 33.15 are merely illustrations of the method by which the "unless you believe" introductory language is to be combined with language from the verdict director being conversed. Unlike other forms of instructions shown in this book, it is not safe to select a complete converse instruction from Chapter 33 for use in particular litigation because the language of the verdict director in the litigation involved is likely to differ from the examples shown in the book. The form for the language of the converse instruction, other than the introductory phrase, is the verdict director itself.

F. If a defendant converses more than one element of a verdict director, the converse instruction should use the same connecting term *(and vs. or)* as used in the verdict director. In other words, in conversing conjunctive submissions, the converse uses "and" between elements; in conversing disjunctive submissions, it uses "or". Thus, the principle that all of the language of the converse instruction except the preliminary phrase is to be taken from the verdict director covers the selection of the appropriate connecting term as well as the other language of the elements being conversed. This simple rule will avoid any error or ambiguity in selecting the proper connecting term, whether conversing conjunctive or disjunctive submissions. See the discussion in 42 Mo.L.Rev. 175 at 181–83 (1977).

G. A true converse instruction requires no independent evidence to support it. The defendant's converse instruction rests upon his contention that the plaintiff has failed to prove some portion of his case; it is the device with which the defendant seeks to emphasize one or more of the elements of the case upon which the plaintiff has the burden of proof. Unlike an affirmative converse instruction, there is *no* requirement that the verdict director contain a phrase, commonly referred to as an "affirmative defense" tail, which refers the jury directly from the verdict director to the true converse instruction.

H. The defendant has the option to converse one or more elements of the verdict director. The only limitation on defendant's right to converse as much or as little of the verdict director as desired is with respect to disjunctive submissions. If defendant elects to converse any element which is submitted by the verdict director in the disjunctive, defendant must converse all such disjunctive elements. For example, if plaintiff submits that defendant either "failed to keep a careful lookout or drove at an excessive speed," a converse stating that "Your verdict must be for defendant unless you believe defendant drove at an excessive speed" would be improper because it deprives the plaintiff of the opportunity for a verdict if the jury does not believe excessive speed but finds defendant failed to keep a proper lookout. A proper converse of excessive speed must also converse lookout. Defendant may converse all of the disjunctive submissions only or may combine his converse of the disjunctive submissions with one or more additional conjunctive submissions from the verdict director. If defendant elects not to converse any of the disjunctive submissions, defendant may converse one or more of the remaining conjunctive submissions as defendant sees fit.

Affirmative Converse

I. The other type of converse instruction provided is an instruction beginning "Your verdict must be for defendant if you believe" followed by a hypothesized ultimate issue which, if true, would defeat plaintiff's claim. *See Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992); and Notes on Use and Committee Comment to MAI 33.05(1). Use of this form requires independent evidence to support it. However, unlike a true converse instruction, there *is* a requirement that the verdict director contain a phrase, commonly referred to as an "affirmative defense" tail, which refers the jury directly from the verdict director to the affirmative converse instruction. The facts hypothesized in an affirmative converse instruction must be sufficient in law to defeat the plaintiff's claim. *Shepard v. Ford Motor Company*, 457 S.W.2d 255 (Mo.App. 1970). The affirmative converse instruction should not be used to submit in the affirmative the same issue in substantially the same language as has already been submitted in the verdict directing instruction. Use a true converse instruction to converse an element submitted by the verdict director. *See Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970); *Oliver v. Bi-State Development Agency*, 494 S.W.2d 49 (Mo. 1973).

Types of Converse Instructions Withdrawn

J. The "If you do not believe" format for a true converse instruction and the general converse instruction (MAI 33.13) are withdrawn because limitations placed on their use under the prior rules resulted in only a limited number of cases in which they could be safely used and added substantially to the complexity of the rules governing the use of converse instructions. Since other instructions are available to accomplish the same purposes with less difficulty, these converse instruction methods will no longer be used.

Conversing Alternative Verdict Directors

K. If plaintiff submits against defendant under alternative verdict directing instructions, defendant should modify the accepted converse instruction format to read as follows:

> Your finding must be for defendant under Instruction Number ________ *(insert the number of the verdict director being conversed)* "unless you believe" followed by one or more of the propositions submitted by the verdict directing instruction being conversed.

Use of the word "finding" in lieu of the word "verdict" avoids directing a verdict for the defendant if plaintiff prevails upon one alternative theory but not on the other.

How Many Converse Instructions Will Be Allowed?

L. Each defendant will be allowed one converse instruction to respond to each verdict directing instruction directed to such defendant. No defendant will be required to join with any other defendant in a converse instruction. However, if two or more defendants wish to join in the same converse instruction, they may do so in appropriate situations by modifying the opening phrase to read, "Your verdict must be for [both] [all] defendants if you believe . . .." If a defendant joins with other defendants in a converse instruction, such instruction counts fully against each such defendant in determining the allowable number of instructions for each such defendant.

M. If one plaintiff submits against two defendants, each such defendant will be allowed one converse instruction in which to respond to the plaintiff's claim. This will occur whether plaintiff submits against both defendants in a single verdict directing instruction or against each defendant in a separate verdict directing instruction. By the same token, if a plaintiff submits alternative theories in two verdict directing instructions against a defendant, such defendant will be allowed two converse instructions, one in which to respond to each such verdict directing instruction.

The fact that two verdict directing instructions against one or more defendants may contain similar language or common theories of recovery shall not deprive each defendant of the opportunity to use one converse instruction for each verdict director directed to such defendant. This rule is intended to operate on a strictly mechanical basis. In a few instances, this rule will allow a greater number of converse instructions than was the case under prior rules but whatever detriment may result therefrom is more than outweighed by the simplicity of a mechanical rule as to the allowable number of converse instructions in a particular case.

CONVERSE INSTRUCTIONS IN COMPARATIVE FAULT CASES

N. Converse instructions are available to both the plaintiff and the defendant in a comparative fault case. *See* MAI 37.04 for the appropriate format. A plaintiff is entitled to converse the comparative fault instruction submitting plaintiff's fault in the same manner in which a defendant may converse the verdict director submitting the defendant's fault. Since in a comparative fault case, the jury does not return a verdict in favor of either party, the converse instruction does not direct the jury in terms of returning a verdict in favor of either party. Rather, the converse instruction directs the jury that "In your verdict you must not assess a percentage of fault to . . .." The other rules concerning such matters as the number of converse instructions allowed, the submissions which may or must be conversed, and the use of the various types of converse instructions apply in a comparative fault case in the same manner as in a non-comparative fault case.

Research References

West's Key Number Digest
Trial ⚷203(3)

Legal Encyclopedias
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1. In general

Giving of converse instruction in medical malpractice action was prejudicial error where converse instruction failed to follow the language of the verdict director; the verdict director stated that the negligence "directly caused or directly contributed to cause" the damage, whereas the converse instruction stated that the damage was a "direct result of such negligence." *Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992).

Where status of plaintiff while visiting defendant church presented a critical factual issue of her status as an invitee or a licensee, the trial court defined "invitee" and also gave an affirmative converse instruction for defendant submitting the elements of plaintiff's status as a "licensee". *Claridge v. Watson Terrace Christian Church of St. Louis*, 457 S.W.2d 785 (Mo.banc 1970).

In action against truck owner for his driver's negligence, it was error to give a converse instruction exonerating the owner unless the jury believed the owner was negligent; it should have submitted the driver's lack of negligence. *Denny v. Mathieu*, 452 S.W.2d 114 (Mo.banc 1970).

Where plaintiff's verdict director submits defendant's failure to use "ordinary care," such as MAI 22.03, Invitee Injured, defendant's converse must be in substantially the same language, and it is error to converse "negligence" since that word was not used in plaintiff's verdict director. *Brewer v. Swift & Co.*, 451 S.W.2d 131 (Mo.banc 1970).

True converse instruction conversing the element of defendant's negligence as in 33.03(2) does not require evidentiary support. *Strickner v. Brown*, 491 S.W.2d 253 (Mo. 1973).

True converse instruction does not require evidentiary support. *Price v. Bangert Bros.*, 490 S.W.2d 53 (Mo. 1973).

Defendant may converse part of plaintiff's submission and also submit plaintiff's contributory negligence as an affirmative defense. *Moore v. Parks*, 458 S.W.2d 344 (Mo. 1970).

Defendant may submit affirmative defense or converse, or both. *Jefferson v. Biggar*, 416 S.W.2d 933 (Mo. 1967).

No error arose from train conductor's decision to converse negligence element of railroad's verdict director on FELA claim, as opposed to element setting forth specific acts of conductor's negligence as hypothesized in verdict director. *Burrus v. Norfolk and Western Ry. Co.*, 977 S.W.2d 39 (Mo.App. E.D. 1998).

Defendant is entitled to converse of plaintiff's verdict directing instruction. *Gilleylen v. Surety Foods, Inc.*, 963 S.W.2d 15 (Mo.App. E.D. 1998).

To benefit from true converse instruction, truck owner sued in rear-end collision case was not required to present evidence or instruct jury in conformance with oral arguments defendant made at trial, since credibility of witness giving oral testimony establishing the affirmative remained for jury, absent judicial admission. *Gilleylen v. Surety Foods, Inc.*, 963 S.W.2d 15 (Mo.App. E.D. 1998).

In action by minor patient's parent against abortion provider to recover for patient's suicide after abortion, instruction that was phrased in the language of an affirmative converse failed to comply with MAI 33.01 and was accordingly erroneous, since instruction did not hypothesize independent evidence to defeat plaintiff's claim and since instruction conversed the propositions submitted in verdict directing instruction; but instructional error was harmless since plaintiff failed to make submissible case. *Eidson v. Reproductive Health Services*, 863 S.W.2d 621 (Mo.App. E.D. 1993).

Affirmative converse instruction to a verdict directing instruction on vexatious refusal to pay pursuant to a contract of suretyship was properly refused where the affirmative converse merely submitted in the affirmative the same issue as submitted in the verdict directing instruction. *Howard Const. Co. v. Teddy Woods Const. Co.*, 817 S.W.2d 556 (Mo.App. W.D. 1991).

"True converse" jury instruction is one that requires no independent evidence for support, but rests rather upon contention that plaintiff failed to prove some element of case. *Palcher v. J.C. Nichols Co.*, 783 S.W.2d 166 (Mo.App. W.D. 1990).

In making comparison between verdict directing instruction and converse instruction to determine validity of converse instruction the Court should not be hypertechnical about language utilized but should be concerned about meaning of instruction to average juror; significance of any language variation between verdict director and converse is in whether same legal theory is contained in both instructions. *Sandza v. City of Des Peres*, 768 S.W.2d 582, 583–85 (Mo.App. E.D. 1989).

General or true converse instruction is characterized by use of words "unless you believe" followed by some or all of propositions submitted in plaintiff's verdict directive instruction. True converse instruction relates back to plaintiff's verdict director and should emphasize necessity for jury to believe certain propositions upon which plaintiff must sustain burden of proof before recovery may be awarded; true conversion instruction may or may not include "tail" referring, for proposition in question, to plaintiff's verdict director. *Powers v. Ellfeldt*, 768 S.W.2d 142, 145 (Mo.App. W.D. 1989).

Where plaintiff submitted failure to use the "highest degree of care", error to give defendant's converse based only on defendant's "negligence". *Doyle v. Bi-State Dev. Agency*, 628 S.W.2d 695 (Mo.App. E.D. 1982).

When defendants are jointly liable for the negligence of either, it was error to give their converse instruction requiring a finding *both* were negligent. *Swindell v. J.A. Tobin Construction Co.*, 629 S.W.2d 536 (Mo.App. W.D. 1981).

In suit by husband and wife it was error to give defendant's converse instruction to find for defendant unless both plaintiffs sustained damages. *Conger v. Queen City Food & Vending, Inc.*, 591 S.W.2d 161 (Mo.App. S.D. 1979).

Although plaintiff's verdict director omitted the essential element that he was *using* the instrument when injured, defendant could properly submit that element in its converse instruction. *Mead v. Corbin Equipment, Inc.*, 586 S.W.2d 388 (Mo.App. W.D. 1979).

Where plaintiff submitted on both lookout and on exceeding speed limit, the latter being negligence per se, it was error to give defendant's single converse instruction, since that was not a defense to plaintiff's per se submission. *Croak v. Wines*, 574 S.W.2d 525 (Mo.App. 1978).

Defendant may submit both converse and contributory negligence instructions. *Van Dyke v. Major Tractor & Equipment Co.*, 557 S.W.2d 11 (Mo.App. 1977).

Slip-and-fall case. Where plaintiff's verdict director unnecessarily included concealed element of causation, it was not error to give defendant's instruction conversing that element. *Young v. Jefferson Hotel Corp.*, 541 S.W.2d 32 (Mo.App. 1976).

Bailee's third-method converse submitting its use of ordinary care. *Broadview Leasing Co. v. Cape Central Airways, Inc.*, 539 S.W.2d 553, 558 (Mo.App. 1976).

Defendant's confusing converse instruction not prejudicial to plaintiff. *Sabbath v. Marcella Cab Co.*, 536 S.W.2d 939 (Mo.App. 1976).

Where plaintiff's verdict director submitted facts constituting negligence per se and did not require a finding defendant was negligent, it was error to give defendant's converse to find for defendant if he was not negligent as submitted in plaintiff's verdict director. *Oventrop v. Bi-State Development Agency*, 521 S.W.2d 488 (Mo.App. 1975).

A true converse instruction requires no evidentiary support. *Arbuthnot v. Charlton*, 512 S.W.2d 464 (Mo.App. 1974).

Where plaintiff's verdict director *unnecessarily* submitted the element of defendant's negligence, defendant properly conversed that element. *Arbuthnot v. Charlton*, 512 S.W.2d 464 (Mo.App. 1974).

Defendant properly allowed to submit both converse and affirmative defense instructions. *Fehlbaum v. Newhouse Broadcasting Corp.*, 483 S.W.2d 664 (Mo.App. 1972).

By a true converse instruction, a defendant may submit only an exact converse of all or essential elements of plaintiff's verdict director. *Ridinger v. Harbert*, 409 S.W.2d 764 (Mo.App. 1966).

2. Partial converse

A converse instruction may converse any one or all of the essential elements of the plaintiff's verdict director. *Anderson v. Cahill*, 528 S.W.2d 742 (Mo.banc 1975).

In conversing MAI 25.04, defendant entitled to converse "defective condition" of Paragraph Second without also conversing "and therefore dangerous, etc." *Lietz v. Snyder Mfg. Co.*, 475 S.W.2d 105 (Mo. 1972).

In products liability case, defendant may converse the separate element that defective article was being used in a manner reasonably anticipated. *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W.2d 362 (Mo. 1969).

Defendant may converse the single element of negligence in plaintiff's verdict director. *Birmingham v. Smith*, 420 S.W.2d 514 (Mo. 1967).

Defendant has a right to converse the single element of negligence in plaintiff's right-of-way submission. *Morris v. Duker*, 414 S.W.2d 77 (Mo. 1967).

Although plaintiff submits two acts as being negligent, defendant may converse negligence generally. *O'Riley v. Coffelt*, 588 S.W.2d 203 (Mo.App. W.D. 1979).

Where plaintiff's verdict director *unnecessarily* submitted the element of defendant's negligence, defendant properly conversed that element. *Arbuthnot v. Charlton*, 512 S.W.2d 464 (Mo.App. 1974).

3. Modification

Where plaintiff properly departed from MAI in his verdict director, defendant was not restricted to one of the MAI converse instructions but could properly modify his converse instruction to match plaintiff's submission. *Morris v. Klein*, 400 S.W.2d 461 (Mo.App. 1966).

4. Negating

Plaintiff's modified MAI 26.06 hypothesized defendant's agreement to pay him commissions; defendant's converse directed a verdict if plaintiff was "not entitled to commissions." Condemned as a roving commission which did not negate an essential element of plaintiff's case. *Lawrie v. Continental Cas. Co.*, 555 S.W.2d 347 (Mo.App. 1977).

"Unless you believe" tail of verdict directing instruction is not necessary to negate defendant's true converse instruction, but doing so is harmless error. *Walkley v. Sears, Roebuck & Co.*, 536 S.W.2d 169 (Mo.App. 1976).

5. Sole cause

Converse instruction adequately covers defense of sole cause. *Birmingham v. Smith*, 420 S.W.2d 514 (Mo. 1967).

6. Language

Error to give a converse instruction that does not converse the verdict director in "substantially the same language." *Anderson v. Cahill*, 528 S.W.2d 742 (Mo.banc 1975).

Where plaintiffs' verdict-director MAI 22.03 submitted defendant's failure to use ordinary care, it was error to give defendant's MAI 33.02(2) conversing *negligence* since the converse was not in substantially the same language as plaintiff's verdict director. *Frogge v. Nyquist Plumbing & Ditching Co.*, 453 S.W.2d 913 (Mo.banc 1970).

Converse to not-in-MAI verdict director approved where it used substantially, although not identically, the same language as the verdict director. *Durbin-Durco, Inc. v. Blades Mfg. Corp.*, 455 S.W.2d 449 (Mo. 1970).

Rule that converse instruction must be in substantially the same words as verdict director is not violated by use of different words having the same meaning. *Bartleman v. Humphrey*, 441 S.W.2d 335 (Mo. 1969).

While true converse must use substantially the same language as verdict director, only differences affecting the meaning are erroneous. *Plas-Chem Corp. v. Solmica Inc.*, 434 S.W.2d 522 (Mo. 1968).

Where plaintiff in a products liability case submitted "fitness" of auto jack for particular purpose (MAI 25.03), it was error to converse that with instruction exculpating the defendant if injury resulted from the "condition" of the jack. This, because MAI 29.01 [Now 33.01] requires substantially the same language used in the verdict director. *Austin v. Western Auto*, 421 S.W.2d 203 (Mo. 1967).

MAI 29.01 [Now 33.01] requires a true converse be "in substantially the same language" used in the verdict director. *Bollman v. Kark Rendering Plant*, 418 S.W.2d 39 (Mo. 1967).

A true converse prefaced by "your verdict must be for defendant, unless you believe," must submit the proposition of the verdict director in substantially the same language used in the verdict director to avoid distortion of the legitimate burden of proof. *Sall v. Ellfeldt*, 662 S.W.2d 517 (Mo.App. W.D. 1983).

Where plaintiff submitted failure to use the "highest degree of care", error to give defendant's converse based only on defendant's "negligence". *Doyle v. Bi-State Dev. Agency*, 628 S.W.2d 695 (Mo.App. E.D. 1982).

Defendant may *disjunctively* converse two elements of plaintiff's res ipsa verdict director—the sudden jerk and negligent causation. *Sabbath v. Marcella Cab Co.*, 536 S.W.2d 939 (Mo.App. 1976).

Where plaintiff's verdict director submitted facts constituting negligence per se and did not require a finding defendant was negligent, it was error to give defendant's converse to find for defendant if he was not negligent as submitted in plaintiff's verdict director. *Oventrop v. Bi-State Development Agency*, 521 S.W.2d 488 (Mo.App. 1975).

Plaintiff's verdict director properly followed MAI 24.01 in submitting that defendant's negligence directly resulted "in whole or in part" in injury to plaintiff. Defendant's converse required that plaintiff sustained damage as a "direct result" of its negligence; held, prejudicially erroneous since it did not substantially follow the language of the verdict director. *Snyder v. Chicago, R.I. & P. Ry. Co.*, 521 S.W.2d 161 (Mo.App. 1973).

In suit on express contract for agreed price for building a garage, the Court properly submitted plaintiff "substantially performed" the contract. Defendant was entitled to converse that specific element but was not entitled to base a converse on three separately described construction defects. *Bullock Co. v. Allen*, 493 S.W.2d 5 (Mo.App. 1973).

True converse in words differing from verdict director held confusing and erroneous. *Reichman v. Camden Fire Ins. Ass'n*, 427 S.W.2d 729 (Mo.App. 1968).

7. Definitions

Where court gave MAI 16.01 defining malice, defendant was not entitled to a converse definition. *Duensing v. Huscher*, 431 S.W.2d 169 (Mo. 1968).

8. Damages

In wrongful death case it is error to give separate converse instructions, one conversing negligence and the other conversing damages. *Higgins v. Gosney*, 435 S.W.2d 653 (Mo. 1968).

Where plaintiff's mother gave MAI 20.01 in action for wrongful death of son omitting finding that plaintiff suffered damages (because nominal damages are presumed), and MAI 5.01 on her measure of damages, it was error for defendant to separately converse the element of damages. *Aubuchon v. LaPlant*, 435 S.W.2d 648 (Mo. 1968).

In suit by husband and wife, it was error to give defendant's converse instruction to find for defendant unless both plaintiffs sustained damages. *Conger v. Queen City Food & Vending, Inc.*, 591 S.W.2d 161 (Mo.App. S.D. 1979).

Defendant not entitled to a separate instruction conversing plaintiff's damage instruction. *Pauling v. Rountree*, 412 S.W.2d 545 (Mo.App. 1967).

9. Only one converse—In general

Converse instructions in medical malpractice action were prejudicial error where instructions combined true converse instruction, using the disjunctive "or," with an affirmative converse instruction; each defendant is allowed only one converse instruction to respond to each verdict directing instruction directed to such defendant. *Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992).

Defendant entitled to only one converse of plaintiff's verdict director. *Potter v. Milbank Mfg. Co.*, 489 S.W.2d 197 (Mo. 1972).

Where Court gave defendant's overall converse by MAI 29.06(6) [Now 33.06(6)], it was error to specifically converse negligence with MAI 29.04(1) [Now 33.04(1)]. *Murphy v. Land*, 420 S.W.2d 505 (Mo. 1967).

Error to give three converse instructions directed against plaintiff's MAI 17.14 (slackening and swerving). *Nugent v. Hamilton & Son*, 417 S.W.2d 939 (Mo. 1967).

Defendant entitled to only one converse to meet plaintiff's verdict director. *Temple v. Atchison, T. & S.F. Ry.*, 417 S.W.2d 97, 99 (Mo. 1967).

Where plaintiff submitted separate verdict directors against four defendants, each defendant was entitled to a separate converse instruction. *Demko v. H & H Inv. Co.*, 527 S.W.2d 382 (Mo.App. 1975).

Where defendant got a true converse, it was proper to refuse an affirmative Third-Method Converse presenting the same defense, since MAI 33.01 says a verdict director may be conversed in one of three ways. *Bishop v. Goldschmidt*, 436 S.W.2d 47 (Mo.App. 1968).

10. Only one converse—Joint plaintiffs

Separate negative converse instructions to husband's personal injury claim and wife's loss of consortium claim, both founded on a strict liability theory, were proper because MAI 2.05 now mandates separate packaging of instructions and defendants could converse each claim without prejudicial error. *Johnston v. Allis-Chalmers Corp.*, 736 S.W.2d 544 (Mo.App. E.D. 1987).

Plaintiffs husband and wife properly gave separate verdict directors since their damage submissions differed. Defendant erroneously gave one converse instruction to find for defendant unless plaintiffs were injured; separate converse instructions required since damages differed. *Burrow v. Moyer*, 519 S.W.2d 568 (Mo.App. 1975).

Where plaintiffs husband and wife submitted separate verdict directors defendant was entitled to only one converse on plaintiffs' theory of recovery, and it was error to give defendant's two general converses (MAI 33.03) since that doubly conversed plaintiff's theory of recovery. (Defendant could have given one converse on plaintiffs' theory of recovery and one converse on wife's separate damage element.) *Wyatt v. Southwestern Bell Tel. Co.*, 514 S.W.2d 366 (Mo.App. 1974).

11. Only one converse—Joint defendants

Where defendants are liable jointly, if at all, they must join in one converse instruction. *Scheele v. American Bakeries*, 427 S.W.2d 361 (Mo. 1968).

12. Disjunctive submission

Plaintiff's res ipsa submission required jury first to believe bus made a sudden stop *and* second, to believe such movement was the result of defendant's negligence. Defendant's converse directed a verdict if the jury did not believe both those two hypotheses. The jury could not disbelieve the first and also disbelieve the second, but the trial court improperly granted plaintiff a new trial on the ground the converse was confusing since it was not prejudicial to plaintiff. *Wims v. Bi-State Development Agency*, 484 S.W.2d 323 (Mo.banc 1972).

Defendant may *disjunctively* converse two elements of plaintiff's res ipsa verdict director—the sudden jerk and negligent causation. *Sabbath v. Marcella Cab Co.*, 536 S.W.2d 939 (Mo.App. 1976).

13. Conjunctive submission

Error to give three converse instructions directed against plaintiff's MAI 17.14 (slackening and swerving). *Nugent v. Hamilton & Son*, 417 S.W.2d 939 (Mo. 1967).

Defendant has the option to converse one or more of the elements of a verdict-director when the elements are submitted in the conjunctive. *Kennedy v. Bi-State Development Agency*, 668 S.W.2d 260 (Mo.App. E.D. 1984).

14. Disjunctive converse

Plaintiff's res ipsa submission required jury first to believe bus made a sudden stop *and* second, to believe such movement was the result of defendant's negligence. Defendant's converse directed a verdict if the jury did not believe both those two hypotheses. The jury could not disbelieve the first and also disbelieve the second, but the trial court improperly granted plaintiff a new trial on the ground the converse was confusing since it was not prejudicial to plaintiff. *Wims v. Bi-State Development Agency*, 484 S.W.2d 323 (Mo.banc 1972).

Where plaintiff submitted disjunctively employer's negligence and negligence of defendant's employee, defendant erred in conversing only defendant's negligence since this absolved defendant from liability for its employee's negligence. *Davis v. St. Louis Southwestern Ry. Co.*, 444 S.W.2d 485 (Mo. 1969).

Where plaintiff submitted two disjunctive acts of negligence, they should have been conversed with "unless you believe" and it was confusing to converse with "if you do not believe." *Davis v. St. Louis Southwestern Ry. Co.*, 444 S.W.2d 485 (Mo. 1969).

Where plaintiff's verdict director is a disjunctive submission, it is error for defendant's "Third Method" converse to direct a verdict on failure to find one of the two submissions. *Travagliante v. J.W. Wood Realty Co.*, 425 S.W.2d 208 (Mo. 1968).

Submission of insurers' disjunctive converse instruction was improper as instruction was an affirmative converse and there was *no* evidence to support its submission. *Petterson v. State Farm General Ins. Co.*, 701 S.W.2d 764 (Mo.App. W.D. 1985).

15. Primary humanitarian submission

Where plaintiff submits on two theories, defendant's converse instruction may not ignore either and must specify the instruction being conversed. *Griffith v. Saavedra*, 409 S.W.2d 665 (Mo. 1966).

When plaintiff submitted both primary and humanitarian negligence, it was error to (1) converse plaintiff's primary verdict director and (2) give defendant's contributory negligence instruction without limiting each to plaintiff's primary negligence submission. *Payton v. Bi-State Development Agency*, 417 S.W.2d 522 (Mo.App. 1967).

16. Products liability

In conversing MAI 25.04, defendant entitled to converse "defective condition" of Paragraph Second without also conversing "and therefore dangerous, etc." *Lietz v. Snyder Mfg. Co.*, 475 S.W.2d 105 (Mo. 1972).

Although plaintiff's verdict director omitted the essential element that he was *using* the instrument when injured, defendant could properly submit that element in its converse instruction. *Mead v. Corbin Equipment Inc.*, 586 S.W.2d 388 (Mo.App. W.D. 1979).

AFFIRMATIVE CONVERSE

Annotations

1. In general

Affirmative converse instruction is suspect unless the converse submits a contested ultimate issue that was omitted from or assumed as true in the verdict director; affirmative converse instruction is not favored and should only be given if supported by the evidence. *Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992).

Giving of affirmative converse instruction in medical malpractice action was prejudicial error where converse instructions were used as means of conversing, in different language, the very same issues submitted in verdict director instruction; affirmative converse instructions were misleading and therefore prejudicial where instructions failed to make clear that defendant-doctor was held to standards of his profession. *Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992).

Where plaintiff properly submitted MAI 17.13, driving on wrong side of the road, and defendant testified she skidded across the center line, it was error to give defendant's affirmative defense instruction exonerating her if she skidded. (This would have been error even had defendant further submitted that her skidding was not negligent.) Such an instruction is akin to an accident instruction condemned by MAI 1.01 and a sole-cause instruction condemned by MAI 1.03. Defendant should be limited to conversing negligence by MAI 33.02(2), and then arguing non-negligent skidding. *Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970).

An affirmative converse instruction is appropriate where the verdict director assumes as true or omits a disputed ultimate issue and there is sufficient evidence to support the instruction. *Douglas v. St. Louis Cold Drawn, Inc.*, 439 S.W.3d 775 (Mo.App. E.D. 2014).

The giving of affirmative converse instructions is not favored and a plaintiff is not required to offer a substitute instruction in this context. *Walton v. City of Seneca*, 420 S.W.3d 640 (Mo.App. S.D. 2013).

Giving an affirmative converse instruction in claim against city was prejudicial error where the instruction required a defense verdict if the jury believed that the instrument of the plaintiff's injury was not the property of the defendant and provided an overly narrow and restrictive definition of property. *Walton v. City of Seneca*, 420 S.W.3d 640 (Mo.App. S.D. 2013).

Where plaintiff's verdict director does not require finding defendant negligent, it is error to give a converse which directs a finding for defendant if he was not negligent since a converse instruction must be in substantially the same language as the verdict director. The court, however, noted that defendant was entitled to an instruction on justification or excuse, and indicated that the error in defendant's converse instruction would have been avoided if it had been reworded, making it an affirmative converse. *Cowell v. Thompson*, 713 S.W.2d 52 (Mo.App. E.D. 1986).

33.02 [1980 Withdrawn] Instructions Conversing Verdict Directing 17.01 Using "If You Do Not Believe" Introduction

Historical Note

(See MAI 33.01—General Comment).

33.03 [1995 Revision] Instructions Conversing Verdict Directing 17.01 Using "Unless You Believe" Introduction

33.03(1)
(Conversing Fact on Which Negligence is Predicated)

Your verdict must be for defendant unless you believe defendant violated the traffic signal.

33.03(2)
(Conversing Negligence)

Your verdict must be for defendant unless you believe defendant was negligent[1] [as submitted in Instruction Number ________].[2]

33.03(3)
(Conversing Damages)

Your verdict must be for defendant unless you believe plaintiff sustained damage.

33.03(4)
(Conversing Negligence and Causation)

Your verdict must be for defendant unless you believe defendant was negligent[1] [as submitted in Instruction Number ________],[2] and as a direct result of such negligence,[1] plaintiff sustained damage.

33.03(5)
(Conversing Damages and Causation)

Your verdict must be for defendant unless you believe defendant was negligent[1] [as submitted in Instruction Number ________],[2] and as a direct result of such negligence,[1] plaintiff sustained damage.

33.03(6)[3]
(Conversing Causation Submitted With MAI 19.01 (First Alternate))

Your verdict must be for defendant unless you believe that defendant's negligence[1] [as submitted in Instruction Number ________][2] directly caused or directly contributed to cause damage to plaintiff.

33.03(7)[3]
(Conversing Negligence and Causation Submitted With MAI 19.01 (First Alternate))

Your verdict must be for defendant unless you believe that defendant was negligent[1] [as submitted in Instruction Number ________][2] and such negligence[1] directly caused or directly contributed to cause damage to plaintiff.

Notes on Use (1995 Revision)

1. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

2. This bracketed material may be included at the option of the defendant.

Caution: The above instructions are examples of the proper method for combining the "unless you believe" introductory phrase with the language from the portion of the verdict director selected to be conversed. These examples are not approved instructions for any particular litigation since the proper language for a converse instruction in any particular litigation depends upon the verdict director being conversed. See MAI 33.01 Converse Instructions—General Comment for rules concerning the use of converse instructions including the use of language from the verdict director in the converse instruction, modifications for conversing alternative verdict directors and limitations upon the number of allowable converse instructions.

3. In *Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992), the Supreme Court held that a converse that required a verdict for defendant unless the jury found causation "as a direct result of" defendant's negligence was prejudicially erroneous where the verdict directing instruction submitted causation with an MAI 19.01 modification as "directly caused or directly contributed to cause". If the verdict directing instruction is modified with the second alternate in MAI 19.01, the converse instruction should utilize substantially the same language to converse causation. Where one of the alternates in MAI 19.01 is modified in a verdict director to fit a submission such as in death cases, premises cases, products cases, or malpractice cases, the converse instruction should utilize substantially the same modified language as used in the verdict directing instruction.

Research References

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1. In general

Although the words of MAI 33.03(2) differ from the words of MAI 33.04(1), the instructions do not differ in substance. *Ernst v. Emerick*, 525 S.W.2d 573 (Mo.App. 1975).

2. Conversing damages

Where plaintiff properly submitted MAI 17.13, driving on wrong side of the road, and defendant testified she skidded across the center line, it was error to give defendant's affirmative defense instruction exonerating her if she skidded. (This would have been error even had defendant further submitted that her skidding was not negligent.) Such an instruction is akin to an accident instruction condemned by MAI 1.01 and a sole-cause instruction condemned by MAI 1.03. Defendant should be limited to conversing negligence by MAI 33.02, and then arguing non-negligent skidding. *Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970).

True converse instruction conversing the element of defendant's negligence as in 33.03(2) does not require evidentiary support. *Strickner v. Brown*, 491 S.W.2d 253 (Mo. 1973).

Two plaintiffs gave four verdict directors against two defendants, each on the same theory of recovery. *Each* defendant gave two converse instructions, one against each plaintiff. No error. *Saveway Oil Co. v. Sears, Roebuck & Co.*, 560 S.W.2d 325 (Mo.App. 1977).

In condemnation suit where there was no evidence of special benefits, some damage is presumed, and it was error to give plaintiff's MAI 33.03(3) conversing damages since that converse is designed to converse the damage element of a plaintiff's verdict director in a suit for damages, not the plaintiff's measure of damage instruction which cannot be conversed. *City of Gladstone v. Hamilton*, 463 S.W.2d 622 (Mo.App. 1971).

3. Separate verdict directors

Error for defendant to give only one converse instruction where plaintiffs husband and wife submitted separate verdict directors on their individual damages. *Long v. REA Express Co.*, 573 S.W.2d 62 (Mo.App. 1978).

Where plaintiffs husband and wife submitted separate verdict directors, defendant was entitled to only one converse on plaintiffs' theory of recovery, and it was error to give defendant's two general converses (MAI 33.03) since that doubly conversed plaintiffs' theory of recovery. (Defendant could have given one converse on plaintiffs' theory of recovery and one converse on wife's separate damage element.) *Wyatt v. Southwestern Bell Tel. Co.*, 514 S.W.2d 366 (Mo.App. 1974).

Where plaintiff had separate verdict directors for false arrest and malicious prosecution, it was proper to give two converse instructions, one for each verdict director. *Brown v. Jones Store*, 493 S.W.2d 39 (Mo.App. 1973).

4. Causation

Truck owner's true converse instruction in rear-end collision case, providing "Your verdict must be for the defendant unless you believe . . .," was proper, where it conformed exactly to format of MAI 33.03(4), and directly conversed language of injured motorist's verdict director. *Gilleylen v. Surety Foods, Inc.*, 963 S.W.2d 15 (Mo.App. E.D. 1998).

33.04 [1995 Revision] Instructions Conversing Verdict Directing 17.02 Using "Unless You Believe" Introduction

33.04(1)
(Conversing Negligence)

Your verdict must be for defendant unless you believe defendant was negligent[1] [as submitted in Instruction Number ________].[2]

33.04(2)
(Conversing Damages)

Your verdict must be for defendant unless you believe plaintiff sustained damage.

33.04(3)
(Conversing Causation)

Your verdict must be for defendant unless you believe that as a direct result of defendant's negligence[1] [as submitted in Instruction Number ________],[2] plaintiff sustained damage.

33.04(4)
(Conversing Damages and Causation)

Your verdict must be for defendant unless you believe defendant was negligent[1] [as submitted in Instruction Number ________],[2] and as a direct result of such negligence,[1] plaintiff sustained damage.

33.04(5)
(Conversing All Disjunctive Specifications of Negligence)

Your verdict must be for defendant unless you believe either defendant failed to keep a careful lookout, or defendant drove at an excessive speed, or defendant's automobile was on the wrong side of the road.

33.04(6)[3]
(Conversing Causation Submitted With MAI 19.01 (First Alternate))

Your verdict must be for defendant unless you believe that defendant's negligence[1] [as submitted in Instruction Number ________][2] directly caused or directly contributed to cause damage to plaintiff.

33.04(7)[3]
(Conversing Negligence and Causation Submitted With MAI 19.01 (First Alternate))

Your verdict must be for defendant unless you believe that defendant was negligent[1] [as submitted in Instruction Number ________][2] and such negligence[1] directly caused or directly contributed to cause damage to plaintiff.

Notes on Use (1995 Revision)

1. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

2. This bracketed material may be included at the option of the defendant.

Caution: The above instructions are examples of the proper method for combining the "unless you believe" introductory phrase with the language from the portion of the verdict director selected to be conversed. These examples are not approved instructions for any particular litigation since the proper language for a converse instruction in any particular litigation depends upon the verdict director being conversed. See MAI 33.01 Converse Instructions—General Comment for rules concerning the use of converse instructions including the use of language from the verdict director in the converse instruction, modifications for conversing alternative verdict directors and limitations upon the number of allowable converse instructions.

3. In *Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992), the Supreme Court held that a converse that required a verdict for defendant unless the jury found causation "as a direct result of" defendant's negligence was prejudicially erroneous where the verdict directing instruction submitted causation with an MAI 19.01 modification as "directly caused or directly contributed to cause". If the verdict directing instruction is modified with the second alternate in MAI 19.01, the converse instruction should utilize substantially the same language to converse causation. Where one of the alternates in MAI 19.01 is modified in a verdict director to fit a submission such as in death cases, premises cases, products cases, or malpractice cases, the converse instruction should utilize substantially the same modified language as used in the verdict directing instruction.

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1. In general

Where plaintiff's verdict director submits in Paragraph First disjunctive acts, defendant may separately converse Paragraph Second submitting that defendant was negligent. *Graeff v. Baptist Temple of Springfield*, 576 S.W.2d 291 (Mo.banc 1978).

Where plaintiff submitted disjunctively employer's negligence and negligence of defendant's employee, defendant erred in conversing only defendant's negligence since this absolved defendant from liability for its employee's negligence. *Davis v. St. Louis Southwestern Ry. Co.*, 444 S.W.2d 485 (Mo. 1969).

Where plaintiff submitted two disjunctive acts of negligence, they should have been conversed with "unless you believe" and it was confusing to converse with "if you do not believe." *Davis v. St. Louis Southwestern Ry. Co.*, 444 S.W.2d 485 (Mo. 1969).

When defendant got an overall converse by MAI 29.06(6) [Now 33.06(6)], it was error to specifically converse negligence with MAI 29.04(1) [Now 33.04(1)]. *Murphy v. Land*, 420 S.W.2d 505 (Mo. 1967).

Although plaintiff submits two acts as being negligent, defendant may converse negligence generally. *O'Riley v. Coffelt*, 588 S.W.2d 203 (Mo.App. W.D. 1979).

Where plaintiff had separate verdict directors for false arrest and malicious prosecution it was proper to give two converse instructions, one for each verdict director. *Brown v. Jones Store*, 493 S.W.2d 39 (Mo.App. 1973).

2. Separate verdict directors

In suit by husband and wife, it was error to give defendant's converse instruction to find for defendant unless both plaintiffs sustained damages. *Conger v. Queen City Food & Vending, Inc.*, 591 S.W.2d 161 (Mo.App. S.D. 1979).

Where plaintiffs husband and wife submitted separate verdict directors defendant was entitled to only one converse on plaintiffs' theory of recovery, and it was error to give defendant's two general converses (MAI 33.03) since that doubly conversed plaintiff's, theory of recovery. (Defendant could have given one converse on plaintiffs' theory of recovery and one converse on wife's separate damage element.) *Wyatt v. Southwestern Bell Tel. Co.*, 514 S.W.2d 366 (Mo.App. 1974).

3. Language

Trial court erred in submitting defendant's requested converse instruction, since converse instruction did not employ substantially the same language used in verdict director. The error was harmless since instruction merely substituted definition for the term "negligence." *McCarthy v. Cullom*, 634 S.W.2d 494 (Mo.App. E.D. 1982).

33.05 [1988 Withdrawn] Conversing Verdict Directing Using Affirmative Converse—"If You Believe" Introduction

Historical Note

(MAI 33.05 and the Notes on Use thereto are withdrawn and replaced by MAI 33.05(1) and the Notes on Use thereto).

33.05(1) [1993 Revision] Conversing Verdict Directing Instruction Using Affirmative Converse—"If You Believe" Introduction

Your verdict must be for defendant if you believe *(here insert the ultimate issue assumed as true or erroneously omitted from plaintiff's verdict director).*

Notes On Use (2015 Revision)

Caution: *Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992), held that "[a]n affirmative converse instruction is appropriate where the verdict director assumes as true or omits a disputed ultimate issue", and "[a]n affirmative converse instruction may be appropriate where it is used by a defendant to submit an ultimate issue that was erroneously excluded from plaintiff's verdict director."

Use of this form carries with it the risk of nonpersuasion because the jurors are told in the burden of proof instruction that if they do not form a belief on a proposition, that proposition fails. Use of this type of converse instruction requires independent evidence to support the facts submitted. These facts must be sufficient in law to defeat the plaintiff's claim. See *Shepard v. Ford Motor Company*, 457 S.W.2d 255 (Mo.App. 1970). *Hiers* does not suggest that defendant is obligated to tender an affirmative converse instruction to cure a plaintiff's verdict director that omits an essential ultimate issue; the defendant is entitled to make an appropriate objection to such a verdict director and stand on that objection. 834 S.W.2d at 735, n. 3.

The affirmative converse instruction should not be used to submit in the affirmative the same issue as has already been submitted in the verdict directing instruction. See *Stover v. Patrick*, 459 S.W.2d 393 (Mo.banc 1970); *Oliver v. Bi-State Development Agency*, 494 S.W.2d 49 (Mo. 1973). Use a true converse instruction to converse an element that is submitted by the verdict director.

Caution: Where an affirmative converse instruction is properly submitted, the verdict director must be modified by adding a phrase, commonly referred to as an "affirmative defense" tail, that refers the jury directly from the verdict director to the affirmative converse instruction. No such "tail" is required when a true converse instruction is submitted. See the discussion in MAI 33.01. In *Goudeaux v. Board of Police Commissioners*, 409 S.W.3d 508 (Mo.App. W.D. 2013), the court held that the facts constituting a legal justification or excuse must be pled as an affirmative defense and that such a submission does not preclude the submission of negligence per se. *Cf. Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992).

Committee Comment (1993 New)

A. In *Wilson v. Checker Cab Company*, 431 S.W.2d 122 (Mo. 1968), where the plaintiff claimed that the defendant was negligent because its driver either stopped so that plaintiff stepped out onto a patch of ice or started the cab before she had fully alighted, the court approved the following affirmative converse instruction:

> "Your verdict must be for defendant if you believe plaintiff fell after she had alighted from the defendant's taxicab and traveled approximately twenty feet from said taxicab."

B. However, the Supreme Court in *Hiers* described the affirmative converse instruction in *Wilson* as violating "a fundamental rule of our scheme of approved instructions," and criticized the holding in *Wilson* as "highly questionable."

C. The affirmative converse instruction may be used to submit an ultimate fact that, if true, would defeat plaintiff's submission. The affirmative converse instruction may also be used to submit legal excuse or justification when plaintiff submits on negligence per se. *See* MAI 33. 05(2); *Cowell v. Thompson*, 713 S.W.2d 52 (Mo.App. E.D. 1986).

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1. In general

Affirmative converse may be used to submit an ultimate fact which, if true, would defeat plaintiff's submission; it is improperly used to hypothesize factual issues not submitted by and essential to plaintiff's submission. *Oliver v. Bi-State Dev. Agency*, 494 S.W.2d 49 (Mo. 1973).

Affirmative converse must have independent evidence to support it. *Koirtyohann v. Washington Plumbing & Heating Co.*, 471 S.W.2d 217 (Mo. 1971).

Instruction, as modified by Court, directing jury to find for defendant if it believed that defendant's wife was sole owner and operator of roofing company and contracted for goods supplied by plaintiff, was better statement of law than converse submitted by defendant, instructing jury to find for defendant if it believed that defendant's wife owned and operated roofing business and contracted for goods supplied by plaintiff. *Petry Roofing Supply, Inc. v. Sutton*, 839 S.W.2d 337 (Mo.App. E.D. 1992).

Evidence in medical malpractice action did not justify physician's affirmative converse instruction, which effectively required the jury to find for the physician if it believed the patient had failed to tell physician about left-sided symptoms prior to her stroke; affirmative converse instruction must be supported by independent evidence and the facts submitted must be sufficient in law to defeat plaintiff's claim; facts that merely relate to negligence or possible comparative fault on the part of the plaintiff do not amount to matters to be submitted as an affirmative converse instruction. *Hiller v. Diestelhorst*, 820 S.W.2d 522 (Mo.App. E.D. 1991).

Affirmative converse instruction to a verdict directing instruction on vexatious refusal to pay pursuant to a contract of suretyship was properly refused where the affirmative converse merely submitted in the affirmative the same issue as submitted in the verdict directing instruction. *Howard Const. Co. v. Teddy Woods Const. Co.*, 817 S.W.2d 556 (Mo.App. W.D. 1991).

In view of omission from plaintiff's verdict director of express requirement that jury make a finding on the contested issue of whether her slip and fall occurred on landowners' property, landowners properly submitted the issue by means of an affirmative converse instruction rather than a converse instruction which directly followed the language of plaintiff's verdict director. *McMullin v. Politte*, 780 S.W.2d 94 (Mo.App. E.D. 1989).

An affirmative converse instruction should not be used to submit the same issue submitted in the verdict directing instruction. *Fidelity & Deposit Co. v. Fleischer*, 772 S.W.2d 809, 817 (Mo.App. E.D. 1989).

Characteristics of affirmative converse instruction are use of words "if you believe" and submission of proposition which does not appear in plaintiff's verdict directing instruction. Function of affirmative converse instruction is to permit defendant to present his theory of case without being required to directly negate plaintiff's theories; because affirmative converse instruction introduces different ultimate fact into instructions, it does not conclude with "tail" referring to plaintiff's verdict directing instruction as does true converse instruction. Affirmative converse instruction requires that defendant submit hypothesized ultimate issue which, if true, would defeat plaintiff's claim. Because defendant bears burden of proof on proposition submitted in affirmative converse instruction, that instruction is appropriate for use only when defendant has carried his burden to produce and relies on independent evidence supporting facts submitted in converse instruction. It is error to submit by affirmative converse instruction the same issues submitted in plaintiff's verdict director. *Powers v. Ellfeldt*, 768 S.W.2d 142, 145 (Mo.App. W.D. 1989).

An affirmative converse instruction must submit and hypothesize ultimate fact issue which, if true, defeats plaintiff's claim. A defendant has the option of submitting his theory of the case through the use of an affirmative converse instruction, but when he does, he must carry his burden of persuasion by producing independent evidence supporting those facts submitted in the instruction. *Tierney v. Berg*, 679 S.W.2d 919 (Mo.App. E.D. 1984).

The facts hypothesized in an affirmative converse instruction must be sufficient in law to defeat plaintiff's claim. *Linkogel v. Baker Protective Services, Inc.*, 659 S.W.2d 300 (Mo.App. E.D. 1983).

33.05(2) [2002 Revision] Affirmative Converse— Legal Justification for Negligence Per Se

Your verdict must be for defendant if you believe:

> First, [defendant's automobile was on the wrong side of the road][1] because *(here set forth circumstances constituting legal justification or excuse)*, and[1]

Second, defendant was not thereby negligent[2].

Notes On Use (2015 Revision)

1. This bracketed phrase is to be used to submit that element of plaintiff's verdict directing instruction that constitutes "negligence per se".

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

This instruction may only be used where plaintiff submits on negligence per se and only if it is supported by the evidence and the facts show that legal justification or excuse is applicable.

Caution: Where an affirmative converse instruction is properly submitted, the verdict director must be modified by adding a phrase, commonly referred to as an "affirmative defense" tail, that refers the jury directly from the verdict director to the affirmative converse instruction. No such "tail" is required when a true converse instruction is submitted. See the discussion in MAI 33.01. In *Goudeaux v. Board of Police Commissioners*, 409 S.W.3d 508 (Mo.App. W.D. 2013), the court held that the facts constituting a legal justification or excuse must be pled as an affirmative defense and that such a submission does not preclude the submission of negligence per se. *Cf. Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992).

Committee Comment (2002 Revision)

A. Caution: In order to submit this instruction, the trial court must determine that the circumstances relied upon by the defendant constitute a legal justification or excuse under Missouri law. "In general, legal justification or excuse requires proof of circumstances beyond the defendant's control and not the result of the defendant's negligence which justify or excuse strict compliance with the statute." *Egenreither v. Carter*, 23 S.W.3d 641, 645 (Mo.App. E.D. 2000).

B. A problem in submitting a converse instruction may arise when the plaintiff submits a negligence per se theory such as MAI 17.17, or

17.18, where the term "negligence" is not mentioned, because the duty is imposed by regulation, statute, or ordinance. *Breeding v. Dodson Trailer Repair*, 679 S.W.2d 281, 287 (Mo.banc 1984); *Cowell v. Thompson*, 713 S.W.2d 52 (Mo.App. E.D. 1986). Where plaintiff's verdict director does not require a finding of negligence, it is error to give a converse concerning negligence of the defendant. *Oventrop v. Bi-State Development Agency*, 521 S.W.2d 488 (Mo.App. 1975). However, the defendant is entitled to instruct on legal justification or excuse, *Ruediger v. American Bus Lines, Inc.*, 426 S.W.2d 4 (Mo. 1967), and may desire to use a converse instruction including the term "negligence," and thus be unable to properly submit a converse in substantially the same language as the plaintiff's verdict director. *Anderson v. Cahill*, 528 S.W.2d 742, 746 (Mo.banc 1975). In these circumstances, an affirmative converse, not a true converse, is needed. An affirmative converse, unlike a true converse, should not and does not use the same language submitted by the plaintiff's verdict director. *Cowell v. Thompson*, 713 S.W.2d 52 (Mo.App. E.D. 1986). Such an affirmative converse under these circumstances does not run contrary to MAI 1.01.

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1. In general

Model jury instruction likely misstates law for availability of converse instruction in negligence per se cases, where instruction does not require that jury find facts constituting legal justification or excuse actually exist, but, rather, as drafted, it merely requires jury to find defendant exercised ordinary care or highest degree of care, and where statute or ordinance imposes affirmative duty beyond ordinary care, submission of that instruction would appear to impermissibly substitute ordinary care for standard of care established by legislature, and model jury instruction also fails to require that defendant must establish both circumstances beyond her control and freedom from negligence as required to establish legal justification or excuse. *Egenreither v. Carter*, 23 S.W.3d 641 (Mo.App. E.D. 2000).

Defendant is not entitled to submit converse instruction patterned on MAI 33.05(2), regardless of nature of her explanation for failing to conform to statute, but she may submit converse instruction only if explanation constitutes legal justification or excuse; in general, legal justification or excuse requires proof of circumstances beyond defendant's control and not the result of defendant's negligence, which circumstances justify or excuse strict compliance with the statute. *Egenreither v. Carter*, 23 S.W.3d 641 (Mo.App. E.D. 2000).

Compliance with leash law was not rendered impossible by any circumstance beyond defendant's control, so defendant's explanation for failure to conform to leash law did not constitute legal justification or excuse for which she would be entitled to converse instruction on negligence per se claim submitted by victim of dog bite; fact that defendant was not at home when incident occurred did not relieve her of affirmative obligation imposed by leash law to insure that dog either remained in yard or was restrained on leash by responsible person, so as to prevent it from biting anyone, and evidence showed defendant failed to use available dog pen to restrain dog. *Egenreither v. Carter*, 23 S.W.3d 641 (Mo.App. E.D. 2000).

In personal injury action involving wrong side of the road case, it was reversible error to submit verdict directing instruction that withheld element of negligence from consideration where negligence per se theory of liability was not tried by consent; even though driver's guilty plea to traffic violation was admissible, submission of instruction based on negligence per se was improper where driver did not plead a statutory violation or negligence per se theory of liability. *Myers v. Morrison*, 822 S.W.2d 906 (Mo.App. E.D. 1991).

33.06 [1990 Withdrawn] Humanitarian Converse Instructions

33.07 [1980 Withdrawn] Issue of Sound and Disposing Mind and Memory

33.08 [1980 Withdrawn] Issue of Furnishing Services and Agreement to Pay

33.09 [1980 Withdrawn] Issue of Implied Agreement to Pay

33.10 [1980 Withdrawn] Issue of Plaintiff Furnishing Services

33.11 [1980 Withdrawn] Issue of Express Contract

33.12 [1980 Withdrawn] Conversing Issue of Accepting Benefits of Services

33.13 [1980 Withdrawn] General Converse

33.14 [1980 Withdrawn] Conversing Verdict Directing 22.02, 22.03, 22.04 and 22.05. Using "If You Do Not Believe" Introduction

Historical Note

(With respect to 33.06–33.14, all are withdrawn. *See* MAI 33.01, General Comment).

33.15 [1995 Revision] Instructions Conversing Verdict Directing 22.02, 22.03, 22.04 and 22.05 Using "Unless You Believe" Introduction

33.15(1)
(Conversing Failure to Use Ordinary Care)

Your verdict must be for defendant unless you believe defendant failed to use ordinary care[1] [as submitted in Instruction Number ________].[2]

33.15(2)
(Conversing Causation)

Your verdict must be for defendant unless you believe plaintiff sustained damage as a direct result of defendant's failure to use ordinary care[1] [as submitted in Instruction Number ________].[2]

33.15(3)
(Conversing Negligence and Causation)

Your verdict must be for defendant unless you believe defendant failed to use ordinary care[1] [as submitted in Instruction Number ________],[2] and that as a direct result of such failure plaintiff sustained damage.

33.15(4)
(Conversing Damages)

Your verdict must be for defendant unless you believe plaintiff sustained damage.

33.15(5)[3]
(Conversing Causation Submitted With MAI 19.01 (First Alternate))

Your verdict must be for defendant unless you believe that defendant's failure to use ordinary care[1] [as submitted in Instruction Number ________] [2] directly caused or directly contributed to cause damage to plaintiff.

33.15(6)[3]

(Conversing Negligence and Causation Submitted With MAI 19.01 (First Alternate))

Your verdict must be for defendant unless you believe that defendant failed to use ordinary care[1] [as submitted in Instruction Number ________] [2] and such failure directly caused or directly contributed to cause damage to plaintiff.

Notes on Use (1996 Revision)

1. The term "ordinary care" must be defined. See definitions in MAI 11.05 and 11.07.

2. This bracketed material may be included at the option of the defendant.

Caution: The above instructions are examples of the proper method for combining the "unless you believe" introductory phrase with the language from the portion of the verdict director selected to be conversed. These examples are not approved instructions for any particular litigation since the proper language for a converse instruction in any particular litigation depends upon the verdict director being conversed. See MAI 33.01 Converse Instructions—General Comment for rules concerning the use of converse instructions including the use of language from the verdict director in the converse instruction, modifications for conversing alternative verdict directors and limitations upon the number of allowable converse instructions.

3. In *Hiers v. Lemley*, 834 S.W.2d 729 (Mo.banc 1992), the Supreme Court held that a converse that required a verdict for defendant unless the jury found causation "as a direct result of" defendant's negligence was prejudicially erroneous where the verdict directing instruction submitted causation with an MAI 19.01 modification as "directly caused or directly contributed to cause". If the verdict directing instruction is modified with the second alternate in MAI 19.01, the converse instruction should utilize substantially the same language to converse causation. Where one of the alternates in MAI 19.01 is modified in a verdict director to fit a submission such as in death cases, premises cases, products cases, or malpractice cases, the converse instruction should utilize substantially the same modified language as used in the verdict directing instruction.

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33.16 [1991 New] Conversing Exemplary Damages

33.16(1)

(Conversing 10.01—Intentional Tort Constituting Outrageous Conduct)

You must not award plaintiff an additional amount as punitive damages under Instruction Number ________ *(here insert number of punitive damage instruction)* unless you believe the conduct of defendant as submitted in Instruction Number ________ *(here insert plaintiff's verdict directing instruction based on intentional tort)* was outrageous because of defendant's evil motive or reckless indifference to the rights of others.

33.16(2)

(Conversing 10.02—Negligence Constituting Conscious Disregard for Others)

You must not award plaintiff an additional amount as punitive damages under Instruction Number ________ *(here insert number of punitive damage instruction)* unless you believe the conduct of defendant as submitted in Instruction Number ________ *(here insert plaintiff's verdict directing instruction based on negligence)* showed complete indifference to or conscious disregard for the safety of others.

33.16(3)

(Conversing 10.04—Strict Liability Failure to Warn—Knowledge Constituting Conscious Disregard for Others)

You must not award plaintiff an additional amount as punitive damages under Instruction Number ________ *(here insert number of punitive damage instruction)* unless you believe:

First, at the time defendant sold the *(describe product)* defendant knew of the danger submitted in Instruction Number ________ *(here insert number of plaintiff's strict liability verdict directing instruction)*, and

Second, defendant thereby showed complete indifference to or conscious disregard for the safety of others.

33.16(4)

(Conversing 10.07—Negligence—Specific Acts and Knowledge Constituting Conscious Disregard for Others)

You must not award plaintiff an additional amount as punitive damages under Instruction Number ________ *(here insert number of punitive damage instruction)* unless you believe:

First, *(here insert the specific act or omission that supports submission of punitive damages)*, and

Second, defendant knew or had information from which defendant, in the exercise of ordinary care,[1] should have known that such conduct created a high degree of probability of injury, and

Third, defendant thereby showed complete indifference to or conscious disregard for the safety of others.

Notes on Use (1991 New)

1. The phrase “ordinary care” must be defined. *See* Chapter 11.

Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo.banc 1990), the defendant is entitled to a converse of the punitive damage instruction.

The above instructions are examples of the proper method of combining the “unless you believe” introductory phrase with the language from the punitive damages instructions that may be submitted in intentional tort, negligence and strict liability cases. See MAI 33.01 Converse Instructions—General Comment, for rules concerning the use of converse instructions. Where punitive damages are submitted, the defendant would be entitled to a converse instruction to the punitive damage instruction as well as a converse instruction to the verdict director.

Committee Comment (2012 New)

A. Exemplary or punitive damages instructions at MAI 10.01, 10.02, 10.04, 10.05, 10.06, and 10.07 contain bracketed sentences to be added if necessary to comply with the requirement of the United States Supreme Court decision in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057, 166 L. Ed. 2d 940 (2007). These bracketed sentences complying with *Williams* should *not* be conversed. The proper method of conversing an exemplary damages instruction from Chapter 10 is as demonstrated in the MAI 33.16.

Research References

West's Key Number Digest
Trial ⚷203(3)

34.00

WITHDRAWAL AND LIMITING INSTRUCTIONS

34.01 General Comment
34.02 Issues and Evidence
34.03 General Benefits—Eminent Domain [Withdrawn 2008]
34.04 F.E.L.A.—Assumption of the Risk [Withdrawn 2012]
34.05 Advance Payments, Undisputed Partial Settlements, or Collateral Source Payments
34.06 Limiting Instructions

Research References

West's Key Number Digest
Trial 🔑203(4)

A.L.R. Library
West's A.L.R. Digest, Trial 🔑203(4)

Legal Encyclopedias
C.J.S., Trial § 651

34.01 [2012 Revision] General Comment

A. A withdrawal instruction is only to be given when during the course of the trial a false issue, improper evidence, or evidence of an abandoned issue has been injected. The purpose of a withdrawal instruction may be served by the court sustaining a motion to strike and admonishing the jury to disregard the evidence. However, in certain instances, the trial court may determine that such action is inadequate, inappropriate or untimely and that a written instruction is necessary.

B. The court may properly give a withdrawal instruction when it has received evidence upon an issue which is later abandoned either by choice or by reason of inadequate proof for final submission to the jury. The instruction to be given is that the issue is no longer open for the jury's consideration.

C. Evidence, rather than an entire issue, may also properly be withdrawn by instruction. In the event evidence, rather than an issue, is sought to be withdrawn from the jury's consideration, care must be taken that such evidence does not also concern an issue still before the jury.

D. Where evidence is admissible for one purpose, but not for another, see MAI 34.06 regarding limiting instructions.

Research References

West's Key Number Digest
Trial ⚷203(4)

Legal Encyclopedias
C.J.S., Trial § 651

Annotations

1. In general

At trial in action against city after child was injured in park, trial court acted within its discretion in determining that a stray issue had been created as to mother's supervision or lack of supervision of child and in therefore giving jury instruction withdrawing from the case evidence of mother's supervision or lack thereof; withdrawal instructions should be given when there is evidence that might mislead the jury in its consideration of the case as pleaded and submitted. *Myers v. City of West Plains, Missouri*, 452 S.W.3d 774 (Mo.App. S.D. 2015).

Withdrawal jury instruction that directed jury not to consider any issue of negligence of health care providers other than doctor and his associate prejudiced doctor's case in wrongful death action based on alleged medical negligence; trial court had permitted doctor to present evidence and argue that negligence of other health care providers was cause of patient's death, and doctor had right to have jury consider evidence and his contention that negligence of others was sole cause of patient's death. *Owens v. Dougherty*, 84 S.W.3d 542 (Mo.App. S.D. 2002).

Withdrawal instructions may be given when evidence on issue has been received but there is inadequate proof for submission of issue to jury; when there is evidence presented which might mislead jury in its consideration of case as pleaded and submitted; when there is evidence presented directed to issue that is abandoned; when there is evidence of such character that might easily raise false issue; or when appropriate to clarify damages for jury. *Stevens v. Craft*, 956 S.W.2d 351 (Mo.App. S.D. 1997).

Determining whether to give withdrawal instruction is matter within trial court's discretion. *Stevens v. Craft*, 956 S.W.2d 351 (Mo.App. S.D. 1997).

Use of withdrawal instruction is to avoid misleading jury on specious issue. *Bailey v. Norfolk and Western Ry. Co.*, 942 S.W.2d 404 (Mo.App. E.D. 1997).

Giving or refusing to give withdrawal instruction is discretionary and reviewable for abuse, which occurs when trial court's ruling is clearly against logic and circumstances and is so arbitrary and unreasonable as to shock sense of justice and indicate lack of careful consideration. *Shady Valley Park & Pool, Inc. v. Fred Weber, Inc.*, 913 S.W.2d 28 (Mo.App. E.D. 1995).

MAI 34.01 may be given when evidence on issue has been received, but there is inadequate proof given for final submission of issue to jury; withdrawal instructions should be given when there is evidence which might mislead jury in its consideration of case as pleaded and submitted. *Arnold v. Ingersoll-Rand Co.*, 908 S.W.2d 757 (Mo.App. E.D. 1995).

Abandonment of issue whether excessive train speed caused collision with car did not entitle railroad company to withdrawal of speed evidence from jury; evidence of train speed was used to calculate braking distance, how long bell, horn, and whistle could have sounded before train struck car, and train speed and automobile speed were also relevant to driver's ability to keep lookout and to react if he heard whistle; trial court did not abuse its discretion in refusing withdrawal instructions that were too broad. *Elfrink v. Burlington Northern Railroad Co.*, 845 S.W.2d 607 (Mo.App. E.D. 1992).

Trial court was not required to give withdrawal instructions involving loss of visibility evidence, effective median barrier, loss of traffic, circuitous travel, loss of business by tenants, loss of rental income and inconvenience of travel in condemnation case involving property used for shopping center; the elements were relevant to theory that the taking involved loss of access destroying future use. *State ex rel. Missouri Highway and Transp. Com'n v. Jim Lynch Toyota, Inc.*, 830 S.W.2d 481 (Mo.App. E.D. 1992).

Use of withdrawal instructions is to avoid misleading jury on specious issue; the giving or refusal of withdrawal instructions is up to discretion of trial judge. *Bradley v. Browning-Ferris Ind.*, 779 S.W.2d 760 (Mo.App. W.D. 1989).

Trial court did not err in refusing to submit instruction withdrawing from consideration all evidence of misuse or evidence of plaintiff's fault since evidence was properly admitted for the consideration of the jury in determining the existence of a defect and the causation of the accident. *Earll v. Consolidated Aluminum Corp.*, 714 S.W.2d 932 (Mo.App. E.D. 1986).

Purpose of withdrawal instruction is to avoid misleading and confusing the jury because of some spurious issue raised by testimony. The instruction is given at the discretion of the trial court, and where there was no reasonable likelihood that the jury would be in any way confused or misled, refusal of the withdrawal instruction was not an abuse of discretion and was not reversible error. *Weisbach v. Vargas*, 656 S.W.2d 797 (Mo.App. W.D. 1983).

Where there is evidence in the case which might raise a false issue, it is reversible error for the court to fail to give an instruction withdrawing such evidence from the jury's consideration. *Harris v. Washington*, 654 S.W.2d 303 (Mo.App. E.D. 1983).

34.02 [1978 Revision] Issues and Evidence

The [evidence] [matter] [issue] [fact][1] of *(here insert withdrawn issue such as "the plaintiff's hospital and medical bills")* is withdrawn from the case and you are not to consider such [evidence] [matter] [issue] [fact][1] in arriving at your verdict.

Notes on Use (1969 New)

1. Select appropriate term.

Committee Comment (1969 New)

A. In *Roberts v. Emerson Electric Manufacturing Co.*, 362 S.W.2d 579, 582 (Mo. 1962), plaintiff sued for failure of defendant, his employer, to give him a proper service letter of dismissal. The Court said:

> Paragraph 14 assigns error in the giving of Instruction 3, which follows: "The Court instructs the jury that this action is not one for damages for wrongful discharge of plaintiff by defendant, and the question as to whether plaintiff was rightfully or wrongfully discharged by defendant is not material to any of the issues in this action and should not be considered in your deliberations." Instruction 3 was a cautionary instruction intended to guard against the consideration of a false issue. "It is not only the office of instructions to inform the jury as to the law of the issues raised, but, where the evidence is of a character as might easily lead to the raising of a false issue, the court ought to guard against such an issue by appropriate instructions." *Estes v. Desnoyers Shoe Co.*, 155 Mo. 577, 56 S.W. 316.

B. While MAI 34.02 is called a "withdrawal" instruction, its use is not limited to withdrawing evidence which is accidently or improperly admitted. It is intended rather to clarify what the jury is to consider in assessing damages. Instructions patterned after MAI 34.02 are intended to withdraw a specific matter which might otherwise mislead the jury.

Research References

West's Key Number Digest
Trial ⚷203(4)

Legal Encyclopedias
C.J.S., Trial § 651

Annotations

In general 1
Automobile accidents 4
Harmless error 2

Workmen's Compensation 3

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1. In general

Evidence of patient's alleged informed consent in a medical malpractice case based on negligence performance of care and treatment was irrelevant and should have been subject to a withdrawal instruction. *Wilson v. P.B. Patel, M.D., P.C.*, 517 S.W.3d 520 (Mo.banc 2017).

In action arising from automobile accident, trial court did not abuse discretion in failing to give requested withdrawal instruction on issue of whether plaintiff motorist could sustain degenerative changes in knee as result of limited ankle movement where evidence of that issue was before jury. *Seabaugh v. Milde Farms, Inc.*, 816 S.W.2d 202 (Mo.banc 1991).

Where defendant's instruction withdrew three items of plaintiff's damages but one of those three items was compensable, the withdrawal instruction was properly refused, and the court had no duty to correctly modify the instruction. *Wors v. Glasgow Village Supermarket*, 460 S.W.2d 583 (Mo. 1970).

When evidence is admissible against one defendant but not the other the latter is entitled to an instruction limiting the extent of that evidence. *Wors v. Glasgow Village Supermarket*, 460 S.W.2d 583 (Mo. 1970).

Where court admitted evidence of rental income but that element was not considered by subsequent value witnesses, trial court properly gave withdrawal instruction not to consider evidence of rental income. *State ex rel. State Highway Commission v. Franklin*, 456 S.W.2d 26 (Mo. 1970).

Withdrawal instruction MAI 34.02 given to withdraw part of witness' testimony. *Welch v. Sheley*, 443 S.W.2d 110 (Mo. 1969).

Where defendant had no duty to paint center stripe on highway detour and that issue was not submitted, court properly gave withdrawal instruction where there was evidence of such failure. *Gilmore v. Union Const. Co.*, 439 S.W.2d 763 (Mo. 1969).

Withdrawal instruction held confusing and erroneous. *State ex rel. State Hwy. Com'n v. Flick*, 427 S.W.2d 469 (Mo. 1968).

Defendant properly modified withdrawal instruction MAI 30.01 [Now 34.02] where it clarified plaintiff's verdict director by excluding consideration of a false issue. *Temple v. Atchison, T. & S.F. Ry.*, 417 S.W.2d 97 (Mo. 1967).

Withdrawal jury instruction was warranted with regard to evidence of child's damages for injury to his spleen in products liability action against child car seat manufacturer, where expert witness testified that the injury to the spleen was not caused by any defects in the car seat. *Uxa ex rel. Uxa v. Marconi*, 128 S.W.3d 121 (Mo.App. E.D. 2003).

Medical malpractice defendant was not entitled to instruction withdrawing from jury's consideration fact that defendant did not order CAT scan prior to surgery, even though plaintiff's expert could not state whether failure caused or contributed to injury; issue was not abandoned, and remained relevant to issue of whether standard of care was followed. *Klaus v. Deen*, 883 S.W.2d 904 (Mo.App. E.D. 1994).

Even though propane gas explosion plaintiff had abandoned negligence theory based on defendant's failure to train distributors, failure to train evidence remained relevant to plaintiff's failure to warn-strict liability issue, and thus denial of withdrawal instruction was proper. *Heifner v. Synergy Gas Corp.*, 883 S.W.2d 29 (Mo.App. S.D. 1994).

Use of MAI 34.02 is not limited to withdrawing evidence which is accidently or improperly admitted; it is intended rather to clarify what jury is to consider in assessing damages and is intended to withdraw specific matter which might otherwise mislead jury. *Dillard v. Atchison, Topeka and Santa Fe Railway Co.*, 882 S.W.2d 211 (Mo.App. W.D. 1994).

In condemnation proceeding, it was not error for trial court to refuse to give MAI 34.02, which would have withdrawn the issue of traffic from the jury's consideration, where the evidence that there would be increased traffic passing the condemnee's property was admissible for the purpose of showing impact on property's highest and best use. *State ex rel. Missouri Highway and Transp. Com'n v. Jim Lynch Toyota, Inc.*, 854 S.W.2d 490 (Mo.App. E.D. 1993).

Trial court in condemnation suit did not abuse its discretion in giving withdrawal instruction barring jury from considering testimony of condemnor's expert except as it rebutted condemnee's evidence where the sales relied on by the expert for purposes of valuing property were not comparable to the property in question and where the expert's opinion of value after taking was unsupported. *State ex rel. Missouri Highway and Transp. Com'n v. Union Realty and Securities Co.*, 827 S.W.2d 768 (Mo.App. E.D. 1992).

In homeowner's suit against builder based on breach of implied warranty of suitability, trial court erred in not submitting withdrawal instruction since testimony regarding what builder should have done was irrelevant. *Lieber v. Bridges*, 650 S.W.2d 688 (Mo.App. S.D. 1983).

Where plaintiff in medical malpractice had cross examined defendant's medical witnesses about their agreement or disagreement with statements in medical texts, the court properly instructed the jury that readings to which no witness agreed "are not evidence". *Berring v. Jacob*, 595 S.W.2d 412 (Mo.App. E.D. 1980).

Not-in-MAI withdrawal instruction in wrongful death action regarding widow's remarriage. *Salsberry v. Archibald Plumbing & Heating Co., Inc.*, 587 S.W.2d 907 (Mo.App. W.D. 1979).

Withdrawal instruction to disregard elements of damage is presumptively effective. *Green v. Crunden Martin Mfg. Co.*, 575 S.W.2d 930 (Mo.App. 1978).

Where condemnee objected to court's erroneous admission of evidence of general benefits, condemnee did not waive the error by failing to offer a withdrawal instruction. *State ex rel. State Hwy. Comm'n v. Johnson*, 544 S.W.2d 276 (Mo.App. 1976).

Where court erroneously admitted evidence of workmen's compensation received by injured plaintiff, refusal to give her withdrawal instruction was reversible error. *Womack v. Crescent Metal Products*, 539 S.W.2d 481 (Mo.App. 1976).

Giving or refusing withdrawal instruction is discretionary and error only when abused. *Helming v. Adams*, 509 S.W.2d 159 (Mo.App. 1974).

In condemnation case, court properly refused to withdraw evidence of construction damage which could have been anticipated at time of taking. *Northeast Missouri Electric Power Co-op v. Cary*, 485 S.W.2d 862 (Mo.App. 1972).

Where plaintiff's evidence of medical expense was improperly admitted over defendant's objection of no causation, the court erred in refusing defendant's withdrawal instruction. *DeMoulin v. Kissir*, 446 S.W.2d 162 (Mo.App. 1969).

Where condemnor feared evidence of amount of gravel sold from condemned land would be misunderstood by the jury, condemnor should have offered a "withdrawal or delimiting instruction." *State ex rel. State Highway Commission v. Yackel*, 445 S.W.2d 389 (Mo.App. 1969).

Giving or refusing MAI 30.01 [Now 34.02] withdrawing evidence of unrelated medical expenses is discretionary. *Kasper v. Helfrich*, 421 S.W.2d 66 (Mo.App. 1967).

2. Harmless error

Instruction erroneously withdrawing an element of plaintiff's damage not prejudicial where jury found against plaintiff on the issue of liability; harmless error. *Gardner v. McGee*, 505 S.W.2d 452 (Mo.App. 1974).

3. Workmen's Compensation

Withdrawal instruction properly withdrew evidence of workmen's compensation benefits paid to plaintiff by his employer. But error to add a paragraph that if plaintiff recovered from defendant he would have to repay his employer. *Sampson v. Missouri Pacific R. Co.*, 560 S.W.2d 573 (Mo.banc 1978).

Instruction that evidence of outcome of employee's worker's compensation claim was withdrawn from case and jury was not to consider such evidence in arriving at verdict, was proper in workers' compensation retaliation action; allowing jury to consider administrative law judge's (ALJ's) finding that employee suffered from two work-related injuries, one of which was compensable, would likely have caused jury to confuse finding with actual ruling against employer. *Wolfe v. Central Mine Equipment Co.*, 895 S.W.2d 83 (Mo.App. E.D. 1995).

4. Automobile accidents

Defendant was not entitled to withdrawal instruction on issue of future medical expenses in personal injury action, in which doctor testified that he expected plaintiff's neck complaints to be permanent, and plaintiff testified, five years after accident, that he continued to occasionally take muscle relaxers to sleep. *Stevens v. Craft*, 956 S.W.2d 351 (Mo.App. S.D. 1997).

Refusal to grant withdrawal instruction on issue of plaintiff's possible future surgery was not an abuse of discretion in automobile accident action in which there was evidence that plaintiff had been told he needed back surgery for pre-existing condition and that accident could have aggravated that condition; plaintiff did not mention such surgery in closing argument, there was nothing before jury concerning expenses for surgery of any kind, and there was no representation to jury that plaintiff's ruptured discs were attributable to accident or that any recommended surgery was intended to address injuries caused by accident. *Stevens v. Craft*, 956 S.W.2d 351

(Mo.App. S.D. 1997).

34.03 [2008 Withdrawn] General Benefits—Eminent Domain

Historical Note

(MAI 34.03 and its related Notes on Use have been withdrawn. All instructions and illustrations related to Eminent Domain have been collected in Chapter 9 of MAI – Civil. MAI 34.03 has been replaced by MAI 9.05 (2008 Revision)).

34.04 [2012 Withdrawn] F.E.L.A.—Assumption of the Risk

Historical Note

(MAI 34.04 and its related Notes on Use have been withdrawn. All instructions related to the Federal Employers' Liability Act have been collected in Chapter 24 of MAI-Civil. MAI 34.04 has been replaced by MAI 24.05 (2012 Revision)).

34.05 [1991 Revision] Advance Payments, Undisputed Partial Settlements, or Collateral Source Payments

If the jury has knowledge, from the evidence or a trial incident, of an advance payment, a partial settlement, or a collateral source payment, then upon the request of any party the following addendum must be added to the appropriate damage instruction:

> In determining the [total][1] amount of plaintiff's damages you are not to consider any evidence of prior payment [to] [on behalf of][2] plaintiff. The judge will consider any such payment and make an adjustment if required by law.

Notes on Use (2012 Revision)

1. Insert if the case is submitted under comparative fault.

2. Select the appropriate bracketed phrase; if both are appropriate, use both in the disjunctive.

Committee Comment (2012 Revision)

A. When the fact or the amount of a partial settlement is in dispute, the addendum in MAI 7.02 is to be added to the damage instruction. If MAI 7.02 is used, MAI 34.05 is not to be used because both instructions contain similar withdrawal language.

B. MAI 1.06 prohibits any instruction directing the jury to credit its verdict with the amount of any advance payment or partial settlement. If appropriate, such a credit will be allowed by the trial court. See the Committee Comment to MAI 1.06 for a discussion of this procedure. Thus, it is no longer necessary to admit evidence of a settlement payment or to allow counsel to advise the jury of a settlement in order to obtain credit for a prior payment.

C. Despite the fact that MAI 7.01 has been withdrawn, the jury may have knowledge of some prior payment. Such knowledge may be acquired from impeaching evidence, a nonresponsive answer, collateral source supposition, or inference from the disappearance of a settling party defendant from the scene during trial. Even though explanation thereof may be made by oral ruling of the court, the jury is likely to speculate about the effect of such payment on its award.

D. While MAI 34.05 is called a "withdrawal" instruction, its use is not limited to withdrawing evidence which is accidentally or improperly admitted. It is intended rather to clarify what the jury is to consider in assessing damages.

Research References

West's Key Number Digest
Trial ⚷203(4)

Annotations

1. In general

Motorist who was struck simultaneously by two automobiles, and who sued drivers of those other automobiles, settling with one for $25,000 prior to trial, was not prejudiced by trial court's failure to instruct jury that it could not consider $25,000 payment in assessing damages; jury rendered verdict in nonsettling defendant's favor, thus finding that plaintiff did not prove negligence or damages. *Toppins v. Miller*, 891 S.W.2d 473 (Mo.App. E.D. 1994).

Withdrawal instruction relating to payments to plaintiff was properly given by trial court where defense counsel injected collateral source payments of plaintiff's medical bills by insurance; withdrawal instruction did not improperly suggest to the jury that award would be reduced by the court by the amount of the payments. *Wallace v. May*, 822 S.W.2d 471 (Mo.App. E.D. 1991).

34.06 [2012 New] Limiting Instructions

> Evidence has been presented *(here state the nature of the evidence that is the subject of this limiting instruction)*.[1] You may consider that evidence only with respect to *(here describe the issue(s) or claim(s) on which such evidence may be considered by the jury)*. You may not consider that evidence [for any other purpose] [on any other issue] [on the (claim(s)) (issue(s))[2] relating to *(here describe the claim(s) or issue(s) on which the evidence may not be considered)*][1,2]

Notes on Use (2012 New)

1. Parentheticals are directions to counsel to select and insert the appropriate phrase or phrases.

2. Select the appropriate bracketed phrase.

Committee Comment (2012 New)

A. This instruction is to be used when evidence is admissible for one purpose but not another. The Committee takes no position on when a limiting instruction is required or whether failure to give a limiting instruction is error. Case law will have to determine those issues. The Committee's intent is to provide a format for submission of a limiting instruction. Care must be used in drafting any limiting instruction in order to guide the jury with respect to the proper consideration of evidence on the appropriate issues or claims on which that evidence may be considered. For a discussion of limiting instructions, see *Sapp. v. Morrison Brothers Company*, 295 S.W.3d 470 (Mo.App. W.D. 2009).

35.00

ILLUSTRATIONS

35.00 General Comment
35.01 Head-On Collision With Counterclaim [Withdrawn 1991]
35.02 Apportionment of Fault—Defendant Adjudged at Fault in Prior Trial Claiming Apportionment in Separate Trial
35.03 Head-On Collision—Suit by Passenger Against Other Driver—Third-Party Claim Against Driver of Passenger's Vehicle for Apportionment of Fault
35.04 Comparative Fault—Right Angle Collision—Suit Against Driver and His Employer—Agency in Issue—Counterclaim for Personal Injury by Employee
35.05 Multiple Defendants—Damages and Apportionment of Fault Determined in Same Trial
35.06(1) Husband and Wife Both Sue for Personal Injuries and Loss of Consortium [Withdrawn 1991]
35.06(2) Husband Sues for Personal Injuries and Wife Sues for Loss of Consortium [Withdrawn 1991]
35.07 Bilateral Contract—Substantial Performance in Issue
35.08 Eminent Domain—All Property Taken [Withdrawn 2008]
35.09 Eminent Domain—Part of Property Taken—Evidence of Damage to Remainder [Withdrawn 2008]
35.10 Product Liability—Defective Ladder
35.11 Submission of One Claim by Two Verdict Directors—Humanitarian and Primary Negligence [Withdrawn 1991]
35.12 Will Contest [Withdrawn 2012]
35.13 Head-On Collision With Counterclaim—Comparative Fault [Withdrawn 1985]
35.14 Comparative Fault—Head-On Collision—Two Defendants
35.15 Negligence and Strict Liability Combined—Comparative Fault—Apportionment of Fault Among Defendants
35.16 Comparative Fault—Head-On Collision—Personal Injury and Loss of Consortium
35.17 No Comparative Fault—Rear End Collision—Personal Injury and Loss of Consortium
35.18 Personal Injury and Consortium Claims—Action Against Health Care Provider—Comparative Fault
35.19 Punitive Damages—Bifurcated Trial Under § 510.263—No Comparative Fault—Two Defendants—Apportionment of Fault Between Defendants
35.20 Medical Malpractice—Minor Injured—Derivative Claim—No Comparative Fault

ILLUSTRATIONS

35.21 Health Care Providers—Settling Tortfeasor—Apportionment of Fault Under § 538.230—With Comparative Fault (Repealed by H.B. 393 (2005))
35.22 Health Care Providers—Settling Tortfeasor—Apportionment of Fault Under § 538.230—No Comparative Fault of Plaintiff (Repealed by H.B. 393)

Research References

West's Key Number Digest

Automobiles ⊶246(22), 246(38.5); Contracts ⊶294; Damages ⊶216(1); Eminent Domain ⊶222(5); Negligence ⊶1746; Products Liability ⊶423; Wills ⊶333

A.L.R. Library

A.L.R. Index, Collisions; Eminent Domain; Instructions to Jury,; Products Liability; Wills

West's A.L.R. Digest, Automobiles ⊶246(22), 246(38.5); Contracts ⊶294; Damages ⊶216(1); Eminent Domain ⊶222(5); Negligence ⊶1720, 1746; Products Liability ⊶423; Wills ⊶333

35.00 [2017 Revision] General Comment

1. The Committee furnishes for your use illustrations prepared by the Committee in certain hypothetical cases using court-approved instructions. If any conflict exists between an instruction and an illustration, the court-approved instruction governs. *Northeast Mo. Elec. Power Co-op. v. Fulkerson*, 542 S.W.2d 26 (Mo.App. 1976); *State ex rel. State Highway Com'n v. Schwartz*, 526 S.W.2d 952 (Mo.App. 1975).

2. In referring to the illustrations, care should be used to be certain that the illustration and its instructions apply to the facts and legal theory of the case being submitted and that none of the instructions used in the illustration has been revised by the Committee. (Always check the most recent pocket part.)

3. In the illustrations in this edition of MAI, factual situations may differ from those used in illustrations in prior editions of MAI. The annotations to the prior illustrations will vary in applicability depending on the extent to which the former factual situation was carried over into the present illustration.

4. The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except: (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230, RSMo, (repealed by H.B. 393) and (2) possibly the revisions by H.B. 393 with respect to punitive damages in § 510.265 and § 537.067, RSMo, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067 on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

5. MAI 2.04 instructs a jury that nine or more jurors must agree in order to return any verdict. See article I, sec. 22(a) of the Missouri Constitution and § 494.490, RSMo.

In *dicta*, the Supreme Court stated that the same nine jurors must agree on all elements necessary for a verdict for or against any particular party. *Stacy v. Truman Med. Ctr.*, 836 S.W.2d 911, 924 (Mo.banc 1992), abrogated on other grounds, *Southers v. City of Farmington*, 263 S.W.3d 603 (Mo.banc 2008). See also, *State ex rel. Boyer v Perigo*, 979 S.W.2d 953, 956 (Mo.App. S.D. 1998).

The general rule is not applicable where the jury is required to return more than one verdict. Where there are multiple packages, each with a separate verdict form, a different group of nine jurors can agree to all of the elements of each verdict. *Mackey v. Smith*, 438 S.W.3d 465, 474 (Mo.App. W.D. 2014); *Kemp v. Burlington Northern R. Co.*, 930 S.W.2d 10, 12 (Mo.App. E.D. 1996). Nine jurors may agree to liability and damages, but a different nine may apportion fault among the defendants. *Powell v. Norman Lines, Inc.*, 674 S.W.2d 191, 199 (Mo.App. E.D. 1984). A different nine also may assess the amount of punitive damages in the second stage of trial under Illustration 35.19 in a bifurcated trial after nine jurors agree on liability, amount of compensatory damages, and liability for punitive damages in the first stage of trial. *Ellison v. O'Reilly Automotive Stores, Inc.*, 463 S.W.3d 426, 439 (Mo.App. W.D. 2015). Jurors who disagree with the remaining jurors on the resolution of one package (verdict) may not be prohibited by jury instructions from deliberating on another package (verdict). To do so would deny the parties the right to a jury of twelve persons deliberating on all issues. *Ellison*, 463 S.W.3d at 440; *Mackey*, 438 S.W.3d at 474; *Powell*, 674 S.W.2d at 199.

See Illustrations 35.02, 35.03, 35.04, 35.05, 35.15, and 35.19 for examples of cases in which packaging is employed to submit multiple claims. On each verdict form within those Illustrations, a different nine may return any verdict in accordance with MAI 2.04.

Research References

West's Key Number Digest
Negligence ⚷1720

Annotations

1. In general

Illustrations provided by MAI do not carry the authority of the approved instructions. *Mathes v. Sher Express, L.L.C.*, 200 S.W.3d 97 (Mo.App. W.D. 2006).

35.01 [1991 Withdrawn] Head-On Collision With Counterclaim

35.02 [2021 Revision] Apportionment of Fault—Defendant Adjudged at Fault in Prior Trial Claiming Apportionment in Separate Trial

Sam Sampson was a passenger in a Ford automobile being driven by his friend William White. Sampson was seriously injured when the Ford automobile collided with a Missouri Pacific train at a railroad grade crossing. In prior litigation, Sampson obtained a judgment for his personal injuries in the amount of $300,000 against Missouri Pacific.

In the present action, Missouri Pacific brings an independent action against William White seeking apportionment of fault of the damages awarded Sampson against Missouri Pacific.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction No. 1
(Same as MAI 2.01)

Instruction No. 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction No. 4
(See MAI 11.02 II)

The term "negligent" or "negligence" as used in these instructions means the failure to use that degree of care that a very careful person would use under the same or similar circumstances.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction No. 6
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 7
(See MAI 2.04)

There are two claims submitted to you and each of them contains a separate verdict form. The verdict forms included in these instructions contain directions for completion and will allow you to return the permissible verdicts in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

* * * * * * *

Instruction No. 8
(See MAI 2.05)

Instructions 8 and 9 and general instructions 1 through 7 apply to the claim of plaintiff Missouri Pacific seeking an apportionment of fault. Use Verdict A to return your verdict on this claim.

Instruction No. 9
(See MAI 17.02, 17.03, 17.05, 19.01)

Your verdict must be for plaintiff Missouri Pacific if you believe:

First, either:

defendant William White failed to keep a careful lookout, or

defendant William White drove at an excessive speed, and

Second, defendant William White, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence either directly caused or directly contributed to cause damage to Sam Sampson.

VERDICT A
(See MAI 36.16)

Note: Complete this form by writing in the name required by your verdict.

On your claim of plaintiff Missouri Pacific seeking an apportionment of fault, we, the undersigned jurors, find in favor of:

____

(Plaintiff Missouri Pacific) or (Defendant William White)

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________

* * * * * * *

Instruction No. 10
(See MAI 2.05)

Instructions 9 and 10 and general instructions 1 through 6 apply to the claim for assessment of the proportions of fault. Use Verdict B to return your verdict on this claim.

Instruction No. 11
(See MAI 4.14)

If your verdict is in favor of plaintiff Missouri Pacific and against defendant William White on the claim seeking apportionment of fault for the $300,000 damages awarded Sam Sampson in the other trial mentioned in the evidence, you must assess the proportion of the fault which each party listed in Verdict B has for such damage.

VERDICT B
(See MAI 36.15)

Note: Complete this form if fault is to be apportioned.

On the claim of plaintiff Missouri Pacific for assessment of the proportions of fault for Sam Sampson's damages assessed in the prior trial, we, the undersigned jurors, find:

Note: Complete by writing in the percentage of the relative fault for each party you believe to be at fault. You may not write in "zero" for plaintiff Missouri Pacific. The total of the percentage you assess must not exceed 100%.

Plaintiff Missouri Pacific is __________% at fault.

Defendant William White is __________% at fault.

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________

* * * * * * *

Committee Comment (1983 Revision)

A. Under the "packaging" concept certain instructions will be fastened together to form their respective packages. *See* MAI 2.00 General Comments. The asterisks through the Illustration designate the end of one package and the beginning of another.

B. In the prior trial, Missouri Pacific was found to be at fault for

Sam Sampson's damages. The basis for that fault is not submitted by instruction for redetermination in the second trial. However, counsel may refer in statements or argument to any ground of Missouri Pacific's fault for Sam Sampson's damages which is supported by the evidence and which properly is before the jury in the second trial.

Research References

West's Key Number Digest
Automobiles ⚷246(38.5)

35.03 [2021 Revision] Head-On Collision—Suit by Passenger Against Other Driver—Third-Party Claim Against Driver of Passenger's Vehicle for Apportionment of Fault

A Buick driven by Prudence Driver and occupied by plaintiff-passenger, Easy Ryder, was struck head-on in its proper lane of travel by a Ford driven by defendant, Harold Careless, which crossed into the wrong lane. Ryder was injured and filed suit against Careless alone. Careless then filed a third-party claim against Driver seeking apportionment of fault for Ryder's damages.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction No. 1
(Same as MAI 2.01)

Instruction No. 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction No. 4
(See MAI 11.03)

The term "negligent" or "negligence" as used in these instructions means the failure to use the highest degree of care. The phrase "highest degree of care" means that degree of care that a very careful person would use under the same or similar circumstances.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction No. 6
(See MAI 2.02)

In returning your verdicts, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 7
(See MAI 2.04)

There are three claims submitted to you and each of them contains a separate verdict form. The verdict forms included in these instructions contain directions for completion and will allow you to return the permissible verdicts in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

* * * * * * *

Instruction No. 8
(See MAI 2.05)

Instructions 8 through 10 and general instructions 1 through 7 apply to the claim of plaintiff Ryder for personal injuries against defendant Careless. Use Verdict A to return your verdict on this claim.

Instruction No. 9
(See MAI 17.01, 17.13, 19.01)

Your verdict must be for plaintiff Ryder if you believe:

First, defendant Careless' automobile was on the wrong side of the road, and

Second, defendant Careless was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

Instruction No. 10
(See MAI 4.01)

If you find in favor of plaintiff Ryder, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future that the collision directly caused or directly contributed to cause.

VERDICT A
(See MAI 36.01)

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff Ryder for personal injuries against defendant Careless, we, the undersigned jurors, find in favor of:

____

(Plaintiff Ryder) or (Defendant Careless)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Ryder.

We, the undersigned jurors, assess the damages of plaintiff Ryder at $________ *(stating the amount).*

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________ ______________________
______________________ ______________________
______________________ ______________________
______________________ ______________________
______________________ ______________________
______________________ ______________________

* * * * * * *

Instruction No. 11
(See MAI 2.05)

Instructions 11 and 12 and general instructions 1 through 7 apply to the claim of defendant Careless against third-party defendant Driver seeking an apportionment of fault. Use Verdict B to return your verdict on the claim.

Instruction No. 12
(See MAI 17.02, 17.04, 17.05, 19.01)

Your verdict must be for defendant Careless if you believe:

First, either:

third-party defendant Driver failed to keep a careful lookout, or

third-party defendant Driver knew or by the use of the highest degree of care could have known that there was a reasonable likelihood of collision in time thereafter to have swerved but third-party defendant Driver failed to do so, and

Second, third-party defendant Driver, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

VERDICT B
(See MAI 36.16)

Note: Complete this form by writing in the name required by your verdict.

On the claim of defendant Careless against third-party defendant Driver seeking an apportionment of fault, we, the undersigned jurors, find in favor of:

____
(Defendant Careless) or (Third-Party Defendant Driver)

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________________ ____________________________
____________________________ ____________________________
____________________________ ____________________________
____________________________ ____________________________
____________________________ ____________________________
____________________________ ____________________________

* * * * * * *

Instruction No. 13
(See MAI 2.05)

Instructions 13 and 14 and general instructions 1 through 7 apply to the claim for assessment of the proportions of fault. Use Verdict C to return your verdict on this claim.

Instruction No. 14
(See MAI 4.13)

If Verdict A is in favor of plaintiff Ryder and against defendant Careless, and if Verdict B is in favor of defendant Careless and against third-party defendant Driver, you must assess the proportion of the fault which each party listed in Verdict C has for plaintiff's damages.

VERDICT C
(See MAI 36.15)

Note: Complete this form if fault is to be apportioned.

On the claim of defendant Careless for assessment of the proportions of fault for plaintiff's damage assessed in Verdict A, we, the undersigned jurors, find:

Note: Complete by writing in the percentage of the relative fault for each party you believe to be at fault. You may not write in "zero" for any party you have determined to be at fault under the other instructions in this case. The total of the percentages you assess must not exceed 100%.

Defendant Careless is ________% at fault.

Third-Party Defendant Driver is ________% at fault.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________

* * * * * * *

Committee Comment (1979 New)

A. Under the "packaging concept," certain instructions will be fastened together to form the respective packages. *See* MAI 2.00 General Comment. The asterisks through the Illustrations designate the ending of a package and the beginning of another.

Research References

West's Key Number Digest
Automobiles 🔑246(22)

35.04 [2021 Revision] Comparative Fault—Right Angle Collision—Suit Against Driver and His Employer—Agency in Issue—Counterclaim for Personal Injury by Employee

Plaintiff, I.M. Hurt, was driving an automobile which collided with a truck owned by Beer Baron, Inc., and driven by its deliveryman-employee, Terry Trucker. The collision occurred at an uncontrolled intersection which Hurt entered from the right and Trucker from the left. Trucker testified that he got there first. Hurt has sued both defendants for personal injury and Trucker has counterclaimed for personal injury. Comparative fault is in issue as to both claims. There is a dispute as to whether Trucker was within the scope of employment.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Sample E1.01 for Illustration 35.04

(1) I would like to explain why we are here today. This is a civil case. A civil trial is different from a criminal trial where the defendant is charged with a crime and could go to jail. A civil trial involves a disagreement between parties where the claims have been brought here to be resolved.

(2) At this time, I will give you a brief description of the case you will hear and the meaning of some important legal terms. This is to help you understand the nature of this case and assist you in evaluating the evidence.

(3) The plaintiff is the party who filed the case. Let me introduce to you the plaintiff I.M. Hurt and his attorney *(insert attorney's name).*

(4) The defendants are the parties against whom the case has been filed. Let me introduce to you the defendants, Beer Baron, Inc., and Terry Trucker, and their attorney(s) *(insert attorney(s)' names).*

(5) This case involves a motor vehicle collision.

(6) Plaintiff Hurt claims that defendant Trucker was negligent and was the employee of defendant Beer Baron, Inc., at the time of the collision, and that plaintiff Hurt was injured, and should be compensated.

(7) Defendants Trucker and Beer Baron, Inc., dispute the claims of plaintiff Hurt and claim that plaintiff Hurt was negligent. Defendant Trucker also claims that he was injured and should be compensated. Defendant Beer Baron, Inc., disputes plaintiff Hurt's claim that defendant Trucker was its employee at the time of the collision.

(8) Plaintiff Hurt disputes the claims of defendants Trucker and Beer Baron, Inc.

(9) The term "negligent" or "negligence" as used in these instructions means the failure to use that degree of care that a very careful person would use under the same or similar circumstances.

(10) The Burden of Proof is as follows:

> Your verdict will depend on the facts you believe after considering all the evidence. The party who relies upon any disputed fact has the burden to cause you to believe that such fact is more likely true than not true. In determining whether or not you believe any fact, you must consider only the evidence and the reasonable conclusions you draw from the evidence.

(11) Where more than one party is claimed to be at fault, you, the jury, will decide if any party is at fault and assess percentages of fault. If appropriate, you will also award damages.

(12) Your verdict must be based on the final instructions given to you after all the evidence. Justice requires that you not make up your mind about the case until all the evidence has been seen and heard and all of you enter the jury room for deliberation of your verdict.

Instruction No. 1
(Same as MAI 2.01)

Instruction No. 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction No. 4
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction No. 6
(See MAI 2.04)

There are two claims submitted to you and each of them contains a separate verdict form. The verdict forms included in these instructions contain directions for completion and will allow you to return the permissible verdicts in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction No. 7
(See MAI 11.02 II)

The term “negligent” or “negligence” as used in these instructions means the failure to use that degree of care that a very careful person would use under the same or similar circumstances.

Instruction No. 8
(See MAI 14.08)

The phrase “yield the right-of-way” as used in these instructions means that if both vehicles reach the intersection at approximately the same time, the driver on the left is required to yield but if both vehicles do not reach the intersection at approximately the same time, then a driver is required to yield to another vehicle which enters the intersection first.

* * * * * * *

Instruction No. 9
(See MAI 2.05)

Instructions 9 through 17 and general instructions 1 through 8 apply to the claim of I.M. Hurt for personal injury. Use Verdict A to return your verdict on this claim.

Instruction No. 10
(See MAI 13.05)

Acts were within the "scope and course of employment" as that phrase is used in these instructions if:

1. they were a part of the work defendant Trucker was employed to perform, and

2. they were done by defendant Trucker to serve the business of defendant Beer Baron, Inc.

Instruction No. 11
(See MAI 37.01, 17.02, 17.05, 17.08, 19.01)

In Verdict A, you must assess a percentage of fault to defendant Trucker, whether or not plaintiff Hurt was partly at fault, if you believe:

First, either:

defendant Trucker failed to keep a careful lookout, or

defendant Trucker failed to yield the right-of-way, and

Second, defendant Trucker, in any one or more of the respects submitted in Paragraph First was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

Instruction No. 12
(See MAI 37.04, 33.04(5))

In your verdict, you must not assess a percentage of fault to defendant Trucker unless you believe defendant Trucker failed to keep a careful lookout or defendant Trucker failed to yield the right-of-way.

Instruction No. 13
(See MAI 37.01, 37.05(1))

In your verdict, you must find defendant Beer Baron, Inc., responsible for any percentage of fault you may assess to defendant Trucker, whether or not plaintiff Hurt was partly at fault, if you believe defendant Trucker was operating defendant Beer Baron, Inc.'s, truck within the scope and course of his employment by defendant Beer Baron, Inc., at the time of the collision.

Instruction No. 14
(See MAI 37.04, 33.04(5))

In your verdict, you must not find defendant Beer Baron, Inc., responsible for any percentage of fault you may assess to defendant Trucker unless you believe defendant Trucker was operating defendant Beer Baron, Inc.'s, truck within the scope and course of his employment by defendant Beer Baron, Inc., at the time of the collision.

Instruction No. 15
(See MAI 37.02, 17.02, 17.05, 17.08)

In Verdict A you must assess a percentage of fault to plaintiff Hurt, whether or not defendant Trucker was partly at fault, if you believe:

First, either:

plaintiff Hurt failed to keep a careful lookout, or

plaintiff Hurt failed to yield the right-of-way, and

Second, plaintiff Hurt, in any one or more of the respects submitted in paragraph First was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause any damage plaintiff may have sustained.

Instruction No. 16
(See MAI 37.04, 33.04(5))

In your verdict, you must not assess a percentage of fault to plaintiff unless you believe plaintiff failed to keep a careful lookout or plaintiff failed to yield the right-of-way.

Instruction No. 17
(See MAI 37.03)

If you assess a percentage of fault to defendant Trucker, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future that the collision directly caused or directly contributed to cause. You must state such total amount of plaintiff's damages in Verdict A.

In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.

VERDICT A
(See MAI 37.07, 37.05(1))

Note: Complete the following paragraph by writing the word(s) required by your verdict.

On the claim of plaintiff for personal injury against defendant Beer Baron, Inc., we, the undersigned jurors, ____
("do"

_______ find defendant Beer Baron, Inc. responsible for any
or "do not")

percentage of fault assessed to defendant Trucker.

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff I.M. Hurt for personal injury, we, the undersigned jurors, assess percentages of fault as follows:

Defendant Terry Trucker	________%	(zero to 100%)
Plaintiff I.M. Hurt	________%	(zero to 100%)
Total	________%	(zero *or* 100%)

Note: Complete the following paragraph if you assessed a percentage of fault to defendant Trucker.

We, the undersigned jurors, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be $____________.
(stating the amount)

Note: The judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________

____________________ ____________________

____________________ ____________________

____________________ ____________________

____________________ ____________________

____________________ ____________________

* * * * * * *

Instruction No. 18
(See MAI 2.05)

Instructions 18 through 21 and general instructions 1 through 8 apply to the claim of Terry Trucker for personal injury. Use Verdict B to return your verdict on this claim.

Instruction No. 19
(See MAI 37.01, 17.02, 17.05, 17.08, 19.01)

In Verdict B, you must assess a percentage of fault to plaintiff Hurt, whether or not defendant Trucker was partly at fault, if you believe:

First, either:

plaintiff Hurt failed to keep a careful lookout, or

plaintiff Hurt failed to yield the right-of-way, and

Second, plaintiff Hurt, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to defendant Trucker.

(Converse Omitted)

Instruction No. 20
(See MAI 37.02, 32.01(2), 17.02, 17.05, 17.08)

In Verdict B, you must assess a percentage of fault to defendant Trucker, whether or not plaintiff Hurt was partly at fault, if you believe:

First, either:

defendant Trucker failed to keep a careful lookout, or

defendant Trucker failed to yield the right-of-way, and

Second, defendant Trucker, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause any damage defendant Trucker may have sustained.

(Converse Omitted)

Instruction No. 21
(See MAI 37.03)

If you assess a percentage of fault to plaintiff, then, disregarding any fault on the part of defendant Trucker, you must determine the total amount of defendant Trucker's damages to be such sum as will fairly and justly compensate defendant Trucker for any damages you believe, defendant Trucker sustained and is reasonably certain to sustain in the future that the collision directly caused or directly contributed to cause. You must state such total amount of defendant Trucker's damages in Verdict B.

In determining the total amount of defendant Trucker's damages, you must not reduce such damages by any percentage of fault you may assess to defendant Trucker. The judge will compute defendant's recovery by reducing the amount you find as defendant Trucker's total damages by any percentage of fault you assess to defendant Trucker.

VERDICT B
(See MAI 37.07)

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of defendant Terry Trucker for personal injury, we, the undersigned jurors, assess percentages of fault as follows:

Plaintiff I.M. Hurt	________%	(zero to 100%)
Defendant Terry Trucker	________%	(zero to 100%)
Total	________%	(zero *or* 100%)

Note: Complete the following paragraph if you assessed a percentage of fault to plaintiff Hurt.

We, the undersigned jurors, find the total amount of defendant Trucker's damages, disregarding any fault on the part of defendant Trucker, to be $____________.
(stating the amount)

Note: The judge will reduce the total amount of defendant Trucker's damages by any percentage of fault you assess to defendant Trucker.

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
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______________________________ ______________________________
______________________________ ______________________________

* * * * * * *

Committee Comment (1991 New)

A. Illustration 35.04 demonstrates an appropriate comparative fault submission against the master and servant on respondeat superior where agency is in issue and the servant has counterclaimed. Instruction No. 13 and Verdict Form A in this Illustration may not be used if separate theories of liability are submitted as to the master and the servant. *See* Committee Comment to MAI 37.05(1). Where the master is sued with the servant on respondeat superior, and agency is not in issue, *see* MAI 37.05(2). Where only the master is sued under respondeat superior, and agency is not in issue, *see* Committee Comment to MAI 37.05(2). For a non-comparative fault submission where agency is in issue, *see* MAI 18.01.

B. If the law compels assessment of the same percentages of fault to the parties on both the original claim and the counterclaim, the following sentence should be added to both verdict forms in this illustration as the last sentence in the initial note:

> "If you find that plaintiff sustained damage in Verdict A and that defendant Trucker sustained damage in Verdict B, then the percentages of fault you assess to each party must be the same in both verdicts."

C. If the law compels the assessment of identical percentages of fault in other fact situations, a similar modification should be made.

Research References

West's Key Number Digest
Automobiles 🔑246(38.5)

Annotations

In general 1
Separate forms 2

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1. In general

Where court gave verdict-directing instructions on both plaintiff's petition and defendant's counterclaim, it was not error to also instruct the jury it could return a verdict against both. *Kirkwood Medical Supply Co. v. Ann Patterson Enterprises, Inc.*, 511 S.W.2d 433 (Mo.App. 1974).

2. Separate forms

Where damages are proper on both petition and counterclaim, separate verdict forms should be submitted. *Forsythe v. Starnes*, 554 S.W.2d 100 (Mo.App. 1977).

35.05 [2021 Revision] Multiple Defendants—Damages and Apportionment of Fault Determined in Same Trial

Nancy Neighbor was a passenger in a Ford automobile being driven by her friend Harriet Host. This Ford was being driven on a through highway when it collided with a Chevrolet pickup driven by Fred Farmer. The pickup entered the through highway from an intersecting farm road. A stop sign faced Farmer.

Neighbor brought an action for her personal injuries against both Farmer and Host. Defendants filed cross-claims seeking apportionment of fault.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction No. 1
(Same as MAI 2.01)

Instruction No. 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction No. 4
(See MAI 11.03)

The term "negligent" or "negligence" as used in these instructions means the failure to use the highest degree of care. The phrase "highest degree of care" means that degree of care that a very careful person would use under the same or similar circumstances.

Instruction No. 5
(See MAI 14.05)

The phrase "yield the right-of-way" as used in these instructions means a driver is required to yield at the stop sign if the other vehicle is within the intersection or is so close to the intersection that it is an immediate hazard.

Instruction No. 6
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction No. 7
(See MAI 2.02)

In returning your verdicts, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 8
(See MAI 2.04)

There are two claims submitted to you and each of them contains a separate verdict form. The verdict forms included in these instructions contain directions for completion and will allow you to return the permissible verdicts in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

* * * * * * *

Instruction No. 9
(See MAI 2.05)

Instructions 9 through 12 and general instructions 1 through 8 apply to the claim of plaintiff Nancy Neighbor for personal injury. Use Verdict A to return your verdict on this claim.

Instruction No. 10
(See MAI 17.02, 17.05, 17.08, 19.01)

Your verdict must be for plaintiff Nancy Neighbor and against defendant Fred Farmer if you believe:

First, either:

defendant Farmer failed to keep a careful lookout, or

defendant Farmer failed to yield the right-of-way, and

Second, defendant Farmer, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence either directly caused damage to plaintiff or combined with the acts of defendant Host to directly cause damage to plaintiff.

Instruction No. 11
(See MAI 17.01, 17.04, 19.01)

Your verdict must be for plaintiff Nancy Neighbor and against defendant Harriet Host if you believe:

First, defendant Host knew or by the use of the highest degree of care could have known that there was a reasonable likelihood of collision in time thereafter to have slackened her speed but defendant Host failed to do so, and

Second, defendant Host was thereby negligent, and

Third, such negligence either directly caused damage to plaintiff or combined with the acts of defendant Farmer to directly cause damage to plaintiff.

Instruction No. 12
(See MAI 4.01)

If you find in favor of plaintiff, then you must award the plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future that the collision directly caused or directly contributed to cause.

VERDICT A
(See MAI 36.01)

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff Nancy Neighbor for personal injuries against defendant Fred Farmer, we, the undersigned jurors, find in favor of:

____

(Plaintiff Nancy Neighbor) or (Defendant Fred Farmer)

On the claim of plaintiff Nancy Neighbor for personal injuries against defendant Harriet Host, we, the undersigned jurors, find in favor of:

____

(Plaintiff Nancy Neighbor) or (Defendant Harriet Host)

Note: Complete the following paragraph only if one or both of the above findings are in favor of plaintiff Nancy Neighbor.

We, the undersigned jurors, assess the damages of plaintiff Nancy Neighbor at $________ (stating the amount).

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________ ______________________
______________________ ______________________
______________________ ______________________
______________________ ______________________
______________________ ______________________
______________________ ______________________

* * * * * * *

Instruction No. 13
(See MAI 2.05)

Instructions 13 and 14 and general instructions 1 through 8 apply to the claim for assessment of the proportions of fault. Use Verdict B to return your verdict on this claim.

Instruction No. 14
(See MAI 4.12)

If your verdict is in favor of plaintiff Neighbor and against both defendants on Verdict A, you must assess the proportion of the fault which each party listed in Verdict B has for plaintiff's damages.

VERDICT B
(See MAI 36.15)

Note: Complete this form if fault is to be apportioned.

On the claim between defendants for assessment of the proportions of fault for plaintiff's damage assessed in Verdict A, we, the undersigned jurors, find:

Note: Complete by writing in the percentage of the relative fault for each party you believe to be at fault. You may not write in "zero" for any party you have determined to be at fault under the other instructions in this case. The total of the percentages you assess must not exceed 100%.

Defendant Farmer is ________% at fault.

Defendant Host is ________% at fault.

Note: All jurors who agree to the above must legibly sign or print their names below.

________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________

* * * * * * *

Committee Comment (1996 Revision)

A. Under the "packaging" concept certain instructions will be fastened together to form their respective packages. *See* MAI 2.00 General Comments. The asterisks through the Illustration designate the end of one package and the beginning of another. This illustration demonstrates a method of submitting the plaintiff's claim and the apportionment of fault issues in the same trial.

Research References

West's Key Number Digest
Automobiles ⚷246(38.5)

Annotations

In general 1
Damages, multiple plaintiffs 3
Separate verdict directors 2
Variation 4

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1. In general

Where there was undisputed evidence of a wife's loss of consortium and jury found for injured husband but against wife, the verdict against her was void for inconsistency. *Foster v. Rosetta*, 443 S.W.2d 183 (Mo. 1969).

2. Separate verdict directors

Plaintiff-husband and wife properly gave separate verdict directors since their damage submissions differed. Defendant erroneously gave one converse instruction to find for defendants unless plaintiffs were injured; separate converse instructions required since damages differed. *Burrow v. Moyer*, 519 S.W.2d 568 (Mo.App. 1975).

Where plaintiffs husband and wife submitted separate verdict directors defendant was entitled to only one converse on plaintiffs' theory of recovery, and it was error to give defendant's two general converses (MAI 33.03) since that doubly conversed plaintiff's theory of recovery. (Defendant could have given one converse on plaintiffs' theory of recovery and one converse on wife's separate damage element.) *Wyatt v. Southwestern Bell Tel. Co.*, 514 S.W.2d 366 (Mo.App. 1974).

When co-plaintiffs' measures of damage are different, each should submit a separate verdict-directing instruction. *Watterson v. Portas*, 466 S.W.2d 129 (Mo.App. 1971).

3. Damages, multiple plaintiffs

Where multiple plaintiffs had separate verdict-directors, each was entitled to a separate damage instruction. *Kennedy v. Tallent*, 492 S.W.2d 33 (Mo.App. 1973).

4. Variation

In consortium damage instruction, use of "thereby" as in MAI 31.04 instead of "as the direct result of such injury" as in MAI's 35.05 and 35.06 not error. *Penn v. Columbia Asphalt Co.*, 513 S.W.2d 679 (Mo.App. 1974).

35.06(1) [1991 Withdrawn] Husband and Wife Both Sue for Personal Injuries and Loss of Consortium

Historical Note

(This Illustration and the Committee Comment are withdrawn).

35.06(2) [1991 Withdrawn] Husband Sues for Personal Injuries and Wife Sues for Loss of Consortium

Historical Note

(This Illustration and the Committee Comment are withdrawn).

35.07 [2021 Revision] Bilateral Contract—Substantial Performance in Issue

Plaintiff Carl Carpenter agreed with defendant Henry Householder to furnish and install sixteen storm windows for $100.00 per unit. Plaintiff installed the sixteen windows, but defendant paid plaintiff only half the agreed amount, contending plaintiff had failed to make the windows airtight. Plaintiff sued for the balance.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI

2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction No. 1
(Same as MAI 2.01)

Instruction No. 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction No. 4
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction No. 5
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 6
(See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction No. 7
(See MAI 26.07)

Your verdict must be for plaintiff if you believe:

First, plaintiff and defendant entered into an agreement whereby plaintiff agreed to furnish and install 16 storm windows upon defendant's house and defendant agreed to pay plaintiff $100.00 per window, and

Second, plaintiff substantially performed such agreement in a workmanlike manner, and

Third, defendant failed to perform defendant's agreement, and

Fourth, plaintiff was thereby damaged.

Instruction No. 8
(See MAI 33.04)

Your verdict must be for defendant unless you believe plaintiff substantially performed such agreement in a workmanlike manner.

Instruction No. 9
(See MAI 16.04)

The phrase "substantially performed" as used in these instructions means performance of all important parts of the contract with only slight variations.

Instruction No. 10
(See MAI 4.09)

If you find in favor of plaintiff, then you must award plaintiff $800.00.

VERDICT A
(See MAI 36.01)

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff Carpenter against defendant Householder, we, the undersigned jurors, find in favor of:

____
(Plaintiff Carpenter) or (Defendant Householder)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Carpenter.

We, the undersigned jurors, assess the damages of plaintiff Carpenter at $________ *(stating the amount)*.

Note: All jurors who agree to the above must legibly sign or print their names below.

__________________________ __________________________

__________________________ __________________________

__________________________ __________________________

__________________________ __________________________

__________________________ __________________________

__________________________ __________________________

Committee Comment (1980 New)

A. In this Illustration, there is only one verdict form and, as a result, all instructions are included in one package. MAI 2.05 is not to be used when there is only one verdict form. *See* MAI 2.00.

Research References

West's Key Number Digest
Contracts 🔑294

35.08 [2008 Withdrawn] Eminent Domain—All Property Taken

Historical Note

(Illustration 35.08 has been withdrawn. All instructions and Illustrations related to Eminent Domain have been collected in Chapter 9 of MAI — Civil. Illustration 35.08 has been replaced by Illustration 9.06 (2008 Revision)).

35.09 [2008 Withdrawn] Eminent Domain—Part of Property Taken—Evidence of Damage to Remainder

Historical Note

(Illustration 35.09 has been withdrawn. All instructions and Illustrations related to Eminent Domain have been collected in Chapter 9 of MAI — Civil. Illustration 35.09 has been replaced by Illustration 9.07 (2008 Revision)).

35.10 [2021 Revision] Product Liability—Defective Ladder

Felix Fixit, an unmarried handyman, bought a wooden six-foot stepladder from Ladder Products Company ("Ladder Products") which manufactured ladders and also maintained a retail outlet. Two weeks later, Felix was standing on the stepladder painting a ceiling in his family room when one of the brace legs at the rear of the ladder broke causing Felix to fall, head-first, into a stone fireplace and sustain injuries. He has sued Ladder Products under a theory of strict liability for product defect. Defendant Ladder Company relies upon contributory fault as an affirmative defense, since the date of injury was *prior to* the effective date of §§ 537.760 *et seq.*, RSMo.

The defect in the wooden leg at the place of the break was shown to have been a loose knot in the lumber from which the leg was fashioned.

Both the original receipt introduced by Fixit and the defendant's file copy show that the purchase price was thirty dollars and that Fixit had been given a six dollar, 20% discount.

Ladder Company's evidence indicated that Fixit had selected the ladder from a number of ladders on display, had pointed out the knot to the salesman and requested and received a markdown in price because of the defect, stating that the knot would cause the leg to fail but that he would put a splice over the knot to strengthen the weak leg.

Felix denied any such occurrence and said he received the 20% discount because he qualified as a commercial contractor and had received a contractor's discount from Ladder Products. Although Ladder Products admitted it did give contractors a discount of 20%, it denied that Fixit was a commercial contractor or had received a contractor's discount.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

<ins>Admonitions</ins> — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction No. 1
(Same as MAI 2.01)

Instruction No. 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction No. 4
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction No. 6
(See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction No. 7
(See MAI 25.04)

Your verdict must be for plaintiff Felix Fixit if you believe:

First, defendant sold the ladder in the course of defendant's business, and

Second, the ladder was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and

Third, the ladder was used in a manner reasonably anticipated, and

Fourth, plaintiff was damaged as a direct result of such defective condition as existed when the ladder was sold,

unless you believe plaintiff is not entitled to recover by reason of Instruction No. 8.

Instruction No. 8
(See MAI 32.23)

Your verdict must be for defendant Ladder Products if you believe:

First, when the ladder was used, plaintiff knew of the danger as submitted in Instruction Number 7 and appreciated the danger of its use, and

Second, plaintiff voluntarily and unreasonably exposed himself to such danger, and

Third, such conduct directly caused or directly contributed to cause any damage plaintiff may have sustained.

Instruction No. 9
(See MAI 4.01)

If you find in favor of plaintiff Felix Fixit, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in evidence.

VERDICT A
(See MAI 36.01)

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff Felix Fixit for personal injuries, we, the undersigned jurors, find in favor of:

____

(Plaintiff Fixit) or (Defendant Ladder Products Company)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Felix Fixit.

We, the undersigned jurors, assess the damages of plaintiff Felix Fixit at $________ *(stating the amount).*

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________

Committee Comment (1991 Revision)

A. In this Illustration, there is only one verdict form submitted and, as a result, all instructions are included in one package. MAI 2.05 is not to be used when there is only one verdict form. *See* MAI 2.00.

B. Caution: This Illustration was drafted for use in cases in which the provisions of §§ 537.760 *et seq.*, RSMo, are *not* applicable.

Research References

West's Key Number Digest
Products Liability ⊶423

35.11 [1991 Withdrawn] Submission of One Claim by Two Verdict Directors—Humanitarian and Primary Negligence

35.12 [2012 Withdrawn] Will Contest

Historical Note

(MAI 35.12 and its related Committee Comments have been withdrawn. All instructions and illustrations related to Will Contests have been collected in Chapter 15 of MAI Civil. MAI 35.12 has been replaced by MAI 15.09 (2012 Revision)).

35.13 [1985 Withdrawn] Head-On Collision With Counterclaim—Comparative Fault

Historical Note

(MAI Illustration 35.13 (published in Vols. 659–60 S.W.2d Missouri Cases, p. XXXIII, *et seq.*) containing the prior MAI Committee recommendation for submitting comparative fault is withdrawn).

35.14 [2021 Revision] Comparative Fault—Head-On Collision—Two Defendants

Vehicles driven by defendant John Host, and defendant, Robert Hitter, had a head-on collision on a two-lane highway. Plaintiff Harry Hurt was a passenger in Host's auto. Plaintiff claims Host failed to keep a careful lookout. Plaintiff claims defendant Hitter was on the wrong side of the highway. Both defendants claim plaintiff was negligent in failing to warn Host. Plaintiff has received serious personal injuries.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction Number 1
(Same as MAI 2.01)

Instruction Number 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction Number 4
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction Number 6
(See MAI 11.08)

The term "negligent" or "negligence" as applied to the driver of a motor vehicle means the failure to use that degree of care that a very careful person would use under the same or similar circumstances. The term "negligent" or "negligence" as applied to a passenger in a motor vehicle means the failure to use that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Instruction Number 7
(See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction Number 8
(See MAI 37.01, 17.01, 17.13, 19.01)

In your verdict, you must assess a percentage of fault to defendant Hitter whether or not plaintiff was partly at fault if you believe:

First, defendant Hitter's automobile was on the wrong side of the road, and

Second, Defendant Hitter was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

Instruction Number 9
(See MAI 37.04, 33.03(1))

In your verdict, you must not assess a percentage of fault to defendant Hitter unless you believe defendant Hitter's automobile was on the wrong side of the road.

Instruction Number 10
(See MAI 37.01, 17.01, 17.05, 19.01)

In your verdict, you must assess a percentage of fault to defendant Host whether or not plaintiff was partly at fault if you believe:

First, defendant Host failed to keep a careful lookout, and

Second, defendant Host was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

Instruction Number 11
(See MAI 37.04, 33.03(1))

In your verdict, you must not assess a percentage of fault to defendant Host unless you believe defendant Host failed to keep a careful lookout.

Instruction Number 12
(See MAI 37.02, 32.02)

In your verdict, you must assess a percentage of fault to plaintiff, whether or not either defendant was partly at fault, if you believe:

First, plaintiff knew he was in immediate danger, and

Second, plaintiff thereafter had time to warn defendant Host and failed to do so, and

Third, plaintiff was thereby negligent, and

Fourth, such negligence directly caused or directly contributed to cause any damage plaintiff may have sustained.

Instruction Number 13
(See MAI 37.04, 33.03(2))

In your verdict, you must not assess a percentage of fault to plaintiff unless you believe plaintiff was negligent as submitted in Instruction Number 12.

Instruction Number 14
(See MAI 37.03)

If you assess a percentage of fault to any defendant, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future that the collision directly caused or directly contributed to cause. You must state such total amount of plaintiff's damages in your verdict.

In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.

VERDICT A
(MAI 37.07 modified)

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff John Hurt for personal injury, we, the undersigned jurors, assess percentages of fault as follows:

Defendant Hitter	________%	(zero to 100%)
Defendant Host	________%	(zero to 100%)
Plaintiff Hurt	________%	(zero to 100%)
TOTAL	________%	(zero OR 100%)

Note: Complete the following paragraph if you assessed a percentage of fault to one or more defendants:

We, the undersigned jurors, find the total amount of plaintiff's damages disregarding any fault on the part of the plaintiff to be $________ (stating the amount).

Note: The judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Note: All jurors who agree to the above must legibly sign or print their names below.

________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________

Committee Comment (1986 New)

A. Illustration 35.14 demonstrates the submission of comparative fault by one plaintiff against two defendants. This method of submission also should be used, with appropriate modifications, in other cases involving single or multiple plaintiffs or defendants. It may not be used where the defendant does not make a submissible case of comparative fault against the plaintiff.

B. Caution: The modification necessary to submit apportionment of fault among parties not sued by plaintiff depends upon substantive issues which may not yet be resolved. The Committee takes no position on unresolved substantive issues.

C. *Gustafson v. Benda*, 661 S.W.2d 11 (Mo.banc 1983), implies that cases following *Missouri Pacific Railroad v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo.banc 1978), continue as authority under *Gustafson*. Case law indicates a separate action may be pursued for apportionment of fault. *See Safeway Stores, Inc. v. City of Raytown*, 633 S.W.2d 727 (Mo.banc 1982); *Rowland v. Skaggs Companies, Inc.*, 666 S.W.2d 770 (Mo.banc 1984); *State ex rel. General Electric Co. v. Gaertner*, 666 S.W.2d 764 (Mo.banc 1984); MAI 35.03, MAI 36.15; MAI 36.16.

Research References

West's Key Number Digest
Automobiles 🔑246(22), 246(38.5)

35.15 [2021 Revision] Negligence and Strict Liability Combined—Comparative Fault—Apportionment of Fault Among Defendants

Vehicles driven by defendant John Host, and defendant, Robert Hitter, had a head-on collision on a two-lane highway. Plaintiff Harry Hurt was a passenger in Host's auto. Plaintiff claims Host failed to keep a careful lookout. Plaintiff claims defendant Hitter was on the wrong side of the highway. Plaintiff claims that Hitter's vehicle had defectively designed brakes that contributed to cause Hitter's vehicle to cross the center line. The vehicle was manufactured by defendant General Car Company. There is evidence that General had prior problems with "pulling" of certain models with the type of brakes on Hitter's vehicle. All defendants claim plaintiff was negligent in failing to warn Host. Plaintiff has received serious personal injuries. All defendants have filed crossclaims against each other seeking apportionment of fault. The date of injury in this illustration was prior to the effective date of §§ 537.760 *et seq.*, RSMo.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

GENERAL PACKAGE

Instruction Number 1
(Same as MAI 2.01)

Instruction Number 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction Number 4
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction Number 6
(See MAI 11.08)

The term “negligent” or “negligence” as applied to the driver of a motor vehicle means the failure to use that degree of care that a very careful person would use under the same or similar circumstances. The term “negligent” or “negligence” as applied to a passenger in a motor vehicle means the failure to use that degree of care that an ordinarily careful person would use under the same or similar circumstances. The term “negligent” or “negligence” as applied to an automobile manufacturer means the failure to use that degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances.[1]

[1] The definition of "negligence" of an automobile manufacturer is used for illustrative purposes only. The Committee takes no position on whether that definition or a definition incorporating MAI 11.10 I or II is more appropriate under developing case law.

Instruction Number 7
(See MAI 2.04)

There are two claims submitted to you and each of them contains a separate verdict form. The verdict forms included in these instructions contain directions for completion and will allow you to return the permissible verdicts in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

* * * * * * *

PACKAGE ONE (PLAINTIFF'S CLAIM)

Instruction Number 8
(See MAI 2.05)

Instructions 8 through 14 and general instructions 1 through 7 apply to the claim of plaintiff Harry Hurt for personal injury [based on theories of product defect and negligence].[2] *Use Verdict A to return your verdict on this claim.*

[2] Bracketed matter in this instruction, patterned after MAI 2.05, may be added to introduce the concept of alternative theories on a single claim for personal injury but is not necessary.

Instruction Number 9
(See MAI 25.04, 19.01)

In Verdict A, on plaintiff's claim for personal injury *based on product defect,* your verdict must be for plaintiff against defendant General Car Company if you believe:

First, defendant General Car Company manufactured the vehicle in the course of said defendant's business, and

Second, the vehicle was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and

Third, the vehicle was used in a manner reasonably anticipated, and

Fourth, such defective condition as existed when the vehicle was manufactured directly caused or directly contributed to cause damage to plaintiff.

(Converse Omitted)

Instruction Number 10
(See MAI 25.09, 37.01, 19.01)

In Verdict A, on the claim of plaintiff for personal injury based on negligence, you must assess a percentage of fault to defendant General Car Company whether or not plaintiff was partly at fault if you believe:

First, defendant General Car Company manufactured the vehicle, and

Second, the vehicle had brakes with a propensity to pull to the left, and

Third, defendant failed to use ordinary care to manufacture the vehicle to be reasonably safe, and

Fourth, such failure directly caused or directly contributed to cause damage to plaintiff.

(Converse Omitted)

Instruction Number 11
(See MAI 37.01, 17.01, 17.13, 19.01)

In Verdict A, on the claim of plaintiff for personal injury based on negligence, you must assess a percentage of fault to defendant Hitter whether or not plaintiff was partly at fault if you believe:

First, defendant Hitter's automobile was on the wrong side of the road, and

Second, defendant Hitter was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

(Converse Omitted)

Instruction Number 12
(See MAI 37.01, 17.01, 17.05, 19.01)

In Verdict A, on the claim of plaintiff for personal injury based on negligence, you must assess a percentage of fault to defendant Host whether or not plaintiff was partly at fault if you believe:

First, defendant Host failed to keep a careful lookout, and

Second, defendant Host was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

(Converse Omitted)

Instruction Number 13
(See MAI 37.02, 32.02)

In Verdict A, on the claim of plaintiff for personal injury based on negligence, you must assess a percentage of fault to plaintiff, whether or not any defendant was partly at fault, if you believe:

First, plaintiff knew plaintiff was in immediate danger, and

Second, plaintiff thereafter had time to warn defendant Host and failed to do so, and

Third, plaintiff was thereby negligent, and

Fourth, such negligence directly caused or directly contributed to cause any damage plaintiff may have sustained.

(Converse Omitted)

Instruction Number 14
(See MAI 37.03)

In Verdict A, if you find in favor of plaintiff against defendant General Car Company on plaintiff's claim for personal injury based on product defect, or if you assess a percentage of fault to any defendant *on the claim of plaintiff for personal injury based on negligence,* then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future that the collision directly caused or directly contributed to cause. You must state such total amount of plaintiff's damages in Verdict A.

In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute any recovery *on plaintiff's claim for personal injury based on negligence* by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.

VERDICT A
(See MAI 36.01, 37.07)

PART I

Note: Complete this form as required by your verdict.

On the claim of plaintiff Hurt for personal injury *based on product defect* against defendant General Car Company, we, the undersigned jurors, find in favor of:

____

(Plaintiff Hurt)	or	(Defendant General Car Company)

PART II

Note: Note: Complete the following by filling in the blanks as required by your verdict *on the claim of plaintiff for personal injury based on negligence whether or not you found in favor of plaintiff on his claim for personal injury based on product defect.* If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%. Otherwise, write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff for personal injury *based on negligence*, we, the undersigned jurors, assess percentages of fault as follows:

Defendant General Car Company	________%	(zero to 100%)
Defendant Hitter	________%	(zero to 100%)
Defendant Host	________%	(zero to 100%)

Plaintiff Hurt	________%	(zero to 100%)
TOTAL	________%	(zero OR 100%)

Part III

Note: Complete the following paragraph *if you find in favor of plaintiff on his claim for personal injury based on product defect or if you assessed a percentage of fault to any defendant* on plaintiff's claim for personal injury based on negligence.

We, the undersigned jurors, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be $____________.
(stating the amount)

Note: *The judge will compute any recovery on plaintiff's claim for personal injury based on negligence by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.*

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________

* * * * * * *

PACKAGE TWO (APPORTIONMENT AMONG DEFENDANTS)

Instruction Number 15
(See MAI 2.05)

Instructions 15 through 16 and general instructions 1 through 7 apply to the claim for apportionment of fault among defendants. Use Verdict B to return your verdict on this claim.

Instruction Number 16
(See MAI 4.12)

If you find in favor of plaintiff and against defendant General Car Company on plaintiff's claim based on product defect and if you assess a percentage of fault to any other defendant in Verdict A,[3] *you must assess the proportion of fault which each party listed in Verdict B has for plaintiff's total damage.*

> MAI 4.12 is modified since apportionment among defendants is handled by the findings on negligence in Verdict A if there is a finding for General Car Company on the strict liability claim. The jury need only address apportionment among the defendants if the verdict on "product defect" is for plaintiff and a percentage of fault is assessed in Verdict A to a defendant other than General Car Company.

VERDICT B
(See MAI 36.15)

Note: Complete this form if fault is to be apportioned among defendants.

On the claim among defendants for assessment of the proportions of fault for plaintiff's total[1] damages assessed in Verdict A, we, the undersigned jurors, find:

Note: Complete by writing in a percentage of the relative fault for each defendant you believe to be at fault. *If you believe a party named below is not at fault, write in "zero" for that percentage. You may not write in "zero" for General Car Company (if you found in favor of plaintiff on plaintiff's claim for personal injury based on product defect)*[2] *or for any defendant to whom you assessed a percentage of fault in Verdict A. (You should not complete this Verdict B if you found in favor of General Car Company on plaintiff's claim based on product defect.)*[3] *The total of the percentages you assess (in this Verdict B)*[4] *must not exceed 100%.*

Defendant General Car Company is ________% at fault.
Defendant Hitter is ________% at fault.
Defendant Host is ________% at fault.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________

Committee Comment (1996 Revision)

A. MAI 35.15 demonstrates an appropriate submission of a strict liability claim with a negligence claim involving comparative fault along with crossclaims among defendants for apportionment of fault. In *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo.banc 1986), the Supreme Court of Missouri held that comparative fault does not apply to plaintiff's claim based on strict liability in tort. This illustration may not be used where the comparative fault of the plaintiff is not in issue in the negligence claim.

B. Caution: The modification necessary to submit apportionment of fault among parties not sued by plaintiff depends on substantive issues which may not be resolved. The Committee takes no position on unresolved substantive issues.

C. *Compare* MAI 35.14 and Committee Comment. Italicized words and phrases in this illustration demonstrate the differences between the submission of the issues in this illustration and a simple comparative fault submission set forth in MAI 35.14.

D. CAUTION: This Illustration was drafted for use in cases in which the provisions of §§ 537.760 *et seq.*, RSMo, are *not* applicable. Changes in tort law effected by the provisions of House Bill 700, 84th General Assembly, 1st Regular Session (1987), applicable to the doctrines of comparative fault and strict liability apply only to causes of action accruing after July 1, 1987. §§ 537.760 *et seq.*

Research References

West's Key Number Digest
Automobiles ⚷246(38.5)

Annotations

In general 1

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1. In general

In a personal injury suit where the cause of action accrued in 1983, it was proper for the instruction not to submit strict liability under comparative fault, but to allow comparative fault to be assessed on the negligent failure to warn claim. Thus, 35.15 was appropriate for submitting strict liability and negligence claims in same suit. *Johnson v. Hyster Co.*, 777 S.W.2d 281, 284–85 (Mo.App. W.D. 1989).

35.16 [2021 Revision] Comparative Fault—Head-On Collision—Personal Injury and Loss of Consortium

Vehicles driven by plaintiff John Host and defendant Robert Hitter had a head-on collision on a two-lane highway. Plaintiffs claim defendant Hitter was on the wrong side of the highway. Plaintiff John Host received serious personal injuries. Plaintiff Mary Host has a consortium claim only and was not in the car. Defendant claims Host failed to keep a careful lookout.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction Number 1
(Same as MAI 2.01)

Instruction Number 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction Number 4
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction Number 6
(See MAI 11.02 II)

The term "negligent" or "negligence" as used in these instructions means the failure to use that degree of care that a very careful person would use under the same or similar circumstances.

Instruction Number 7
(See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction Number 8
(See MAI 37.01, 17.01, 17.13, 19.01)

In your verdict, you must assess a percentage of fault to defendant Hitter, whether or not plaintiff John Host was partly at fault, if you believe:

First, defendant Hitter's automobile was on the wrong side of the road, and

Second, defendant Hitter was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff John Host.

Instruction Number 9
(See MAI 37.04, 33.03(1))

In your verdict, you must not assess a percentage of fault to defendant Hitter unless you believe defendant Hitter's automobile was on the wrong side of the road.

Instruction Number 10
(See MAI 37.02, 17.01, 17.05, 19.01)

In your verdict, you must assess a percentage of fault to plaintiff John Host, whether or not defendant Hitter was partly at fault, if you believe:

First, plaintiff John Host failed to keep a careful lookout, and

Second, plaintiff John Host was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause any damage plaintiff John Host may have sustained.

Instruction Number 11
(See MAI 37.04, 33.03(1))

In your verdict, you must not assess a percentage of fault to plaintiff John Host unless you believe plaintiff John Host failed to keep a careful lookout.

Instruction Number 12
(See MAI 31.04)

If you assess a percentage of fault to defendant and if you believe that plaintiff Mary Host sustained damage as a direct result of injury to her husband John Host, then in your verdict, you must find that plaintiff Mary Host did sustain such damage.

Instruction Number 13
(See MAI 33.03, Modified)

Unless you believe plaintiff Mary Host sustained damage as a direct result of injury to her husband John Host, then in your verdict, you must find that plaintiff Mary Host did not sustain such damage.

Instruction Number 14
(See MAI 37.08)

If you assess a percentage of fault to defendant, then, disregarding any fault on the part of plaintiff John Host, you must determine the total amount of plaintiff John Host's damages on his claim for personal injury. If you further find that plaintiff Mary Host did sustain damage as a direct result of injury to her husband, John Host, you must determine the total amount of Mary Host's damages on her claim for damages due to injury to her husband.

Total damages on each claim must be such sum as will fairly and justly compensate the plaintiff on that claim for any such damages you believe that plaintiff sustained and is reasonably certain to sustain in the future that the collision directly caused or directly contributed to cause. You must state separately in your verdict the total amount of each plaintiff's damages on each claim.

In determining the total amount of each plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff John Host. The judge will compute the recovery of each plaintiff under the law and the percentages of fault you assess.

Verdict
(See MAI 37.09)

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

We, the undersigned jurors, assess percentages of fault as follows:

Defendant Hitter	________%	(zero to 100%)
Plaintiff John Host	________%	(zero to 100%)
TOTAL	________%	(zero OR 100%)

Note: Complete the following paragraphs if you assessed a percentage of fault to defendant.

On the claim of plaintiff John Host for personal injury, we, the undersigned jurors, find the total amount of plaintiff John Host's damages, disregarding any fault on the part of plaintiff John Host, to be $________ (stating the amount).

Note: Complete the following paragraph by writing the word(s) required by your verdict.

On the claim of plaintiff Mary Host for damages due to injury to her husband, John Host, we, the undersigned jurors, find that plaintiff Mary Host ____________ ("did" or "did not"), sustain damage as a direct result of injury to her husband, John Host.

Note: Compete the following paragraph only if the above finding is that Mary Host "did" sustain such damage.

We, the undersigned jurors, find the total amount of plaintiff Mary Host's damages due to injury to her husband, John Host, disregarding any fault on the part of plaintiff John Host, to be $________ (stating the amount).

Note: The judge will compute the recovery of each plaintiff under the law and the percentages of fault you assess.

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________________ ______________________________
______________________________ ______________________________
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______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________

* * * * * * *

Committee Comment (1991 New)

A. In a case in which comparative fault is submissible, MAI 35.16 demonstrates an appropriate submission, in a single package, of a single injury claim along with a single, derivative consortium claim against one defendant. This Illustration may be easily adapted for submission against additional defendants. This MAI 35.16 was drafted to comply with the mandate of *Johnson v. Hyster Co.*, 777 S.W.2d 281 (Mo.App. W.D. 1989), which held that the percentages of fault assessed on the claim of an injured plaintiff automatically apply to the consortium claim and that verdict forms that allow the jury to assess different percentages of fault on the consortium claim would be improper.

B. More complex comparative fault cases, such as a situation in which both husband and wife each have separate injury and consortium claims because they were hurt in the same accident, may more appropriately be packaged separately. This Illustration should not be used where comparative fault is not in issue. See MAI 35.17 for a non-comparative fault submission of a simple case involving an injury claim and a consortium claim.

C. See the discussion of packaging in Chapter 2.00.

D. Caution: The modification necessary to submit apportionment of fault among parties not sued by plaintiff depends on substantive issues that may not be resolved. The Committee takes no position on unresolved substantive issues.

E. *Compare* MAI 35.14 and Committee Comment.

Research References

West's Key Number Digest
Automobiles ⚷246(22), 246(38.5)

35.17 [2021 Revision] No Comparative Fault—Rear End Collision—Personal Injury and Loss of Consortium

A vehicle driven by plaintiff John Hurt was struck from the rear on a city street by a vehicle driven by defendant Robert Hitter. Plaintiff John Hurt received serious personal injuries. Plaintiff Mary Hurt has a consortium claim only and was not in the car. There is no submissible issue of fault on the part of plaintiff.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction Number 1
(Same as MAI 2.01)

Instruction Number 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction Number 4
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction Number 6
(See MAI 11.02 II)

The term "negligent" or "negligence" as used in these instructions means the failure to use that degree of care that a very careful person would use under the same or similar circumstances.

Instruction Number 7
(See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction Number 8
(See MAI 17.01 and 17.16)

Your verdict must be for plaintiff John Hurt if you believe:

First, defendant's automobile came into collision with the rear of plaintiff's vehicle, and

Second, defendant Hitter was thereby negligent, and

Third, as a direct result of such negligence plaintiff John Hurt sustained damage.

(Converse Omitted)

Instruction Number 9
(MAI 31.04)

If you find in favor of plaintiff John Hurt on his claim for personal injuries and if you believe that plaintiff Mary Hurt sustained damage as a direct result of injury to her husband, John Hurt, then in your verdict you must find that plaintiff Mary Hurt did sustain such damage.

Instruction Number 10
(See MAI 33.03, Modified)

Unless you believe plaintiff Mary Hurt sustained damage as a direct result of injury to her husband, John Hurt, then in your verdict you must find that plaintiff Mary Hurt did not sustain such damage.

Instruction Number 11
(See MAI 4.18)

If you find in favor of plaintiff John Hurt, then you must award plaintiff John Hurt such sum as you believe will fairly and justly compensate plaintiff John Hurt for any damages you believe John Hurt sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence.

If you further find that plaintiff Mary Hurt did sustain damage as a direct result of injury to her husband, John Hurt, you must award plaintiff Mary Hurt such sum as you believe will fairly and justly compensate plaintiff Mary Hurt for any damages due to injury to her husband, John Hurt, which you believe Mary Hurt sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence.

Verdict
(See MAI 36.23)

Note: Complete this form by writing in the name(s) required by your verdict.

On the claim of plaintiff John Hurt for personal injuries against defendant Robert Hitter, we, the undersigned jurors, find in favor of:

____

(Plaintiff John Hurt) or (Defendant Robert Hitter)

Note: Complete the following paragraphs only if the above finding is in favor of plaintiff John Hurt.

We, the undersigned jurors, assess the damages of plaintiff John Hurt for his personal injuries at $________ (stating the amount).

Note: Complete the following paragraph by writing in the word(s) required by your verdict.

On the claim of plaintiff Mary Hurt for damages due to injury to her husband, John Hurt, we, the undersigned jurors, find that plaintiff Mary Hurt ____________ (“did” or “did not”) sustain damage as a direct result of injury to her husband, John Hurt.

Note: Complete the following paragraph only if the above finding is that Mary Hurt “did” sustain such damage.

We, the undersigned jurors, assess the damages of plaintiff Mary Hurt due to injury to her husband at $________ (stating the amount).

Note: All jurors who agree to the above must legibly sign or print their names below.

________________________ ________________________

________________________ ________________________

________________________ ________________________

________________________ ________________________

________________________ ________________________

________________________ ________________________

Committee Comment (1991 New)

A. In a non-comparative fault situation, MAI 35.17 demonstrates an appropriate submission, in a single package, of a single injury claim along with a single derivative consortium claim against one defendant. This Illustration may be easily adapted for submission against additional defendants. This MAI 35.17 was drafted to be consistent with the method of submitting loss of consortium in a comparative fault case as shown in MAI 35.16 and to avoid the duplication of the liability elements of the verdict director that was present under the old system of submitting loss of consortium.

B. More complex cases involving loss of consortium, such as a situation in which both husband and wife each have separate injury and consortium claims because they were hurt in the same accident, may more appropriately be packaged separately. This Illustration should not be used where comparative fault is in issue. See MAI 35.16 for a comparative fault submission of a simple case involving an injury claim and a consortium claim.

C. See the discussion of packaging in Chapter 2.00.

Research References

West's Key Number Digest
Automobiles ⚷246(22), 246(38.5)

Annotations

In general 1

1. In general

The Missouri Supreme Court refused to recognize a cause of action for loss of parental consortium (consortium action by child due to injury to parent) or filial consortium (consortium action by sibling due to injury to another sibling). *Powell v. American Motors Corp.*, 834 S.W.2d 184 (Mo.banc 1992).

35.18 [2021 Revision] Personal Injury and Consortium Claims—Action Against Health Care Provider—Comparative Fault

Dr. Edward Smith performed surgery on plaintiff John Jones. Plaintiff claims that Smith left a sponge in plaintiff's abdomen during the surgery. Smith claims that plaintiff failed to advise Smith of abdominal distention. Mary Jones has a claim for loss of consortium only and has presented no evidence or has chosen not to submit any elements of economic damage on her derivative claim. All parties agree that Jones would have had no residual problems from the surgery if the sponge had not been left in his abdomen.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction No. 1
(Same as MAI 2.01)

Instruction No. 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction No. 4
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction No. 6
(See MAI 11.06)

The term "negligent" or "negligence" as used in these instructions with respect to a physician means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of that physician's profession.

Instruction No. 7
(See MAI 11.07)

The term "negligent" or "negligence" as used in these instructions with respect to a patient means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Instruction No. 8
(See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction No. 9
(See MAI 21.01, MAI 37.01)

In your verdict, you must assess a percentage of fault to defendant Smith, whether or not plaintiff John Jones was partly at fault, if you believe:

First, defendant Smith left a sponge in plaintiff's abdomen during surgery, and

Second, defendant was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

(Converse Omitted)

Instruction No. 10
(See MAI 31.04)

If you assess a percentage of fault to defendant, and if you believe that plaintiff Mary Jones sustained damage as a direct result of injury to her husband, John Jones, then in your verdict you must find that plaintiff Mary Jones did sustain such damage.

Instruction No. 11
(See MAI 37.02)

In your verdict you must assess a percentage of fault to plaintiff John Jones, whether or not defendant was partly at fault, if you believe:

First, plaintiff John Jones failed to advise Dr. Smith of abdominal distention, and

Second, plaintiff John Jones was thereby negligent, and

Third, such negligence of plaintiff John Jones directly caused or directly contributed to cause any damage plaintiff John Jones may have sustained.

(Converse Omitted)

Instruction No. 12
(See MAI 21.04, and 37.08)

If you assess a percentage of fault to defendant, then, disregarding any fault on the part of plaintiff John Jones you must determine the total amount of plaintiff John Jones' damages on John Jones' claim for personal injury. If you further find that plaintiff Mary Jones did sustain damage as a direct result of injury to her husband, John Jones, you must determine the total amount of her damages on Mary Jones' claim for damages due to injury to her husband, John Jones.

Total damages on each claim must be such sum as will fairly and justly compensate the plaintiff on that claim for any such damages you believe that plaintiff sustained and is reasonably certain to sustain in the future that the medical treatment by the defendant directly caused or directly contributed to cause. You must state separately in your verdict the total amount of each plaintiff's damages on each claim, and you must itemize those total damages on each claim by the categories set forth in the verdict form.

In determining the total amount of each plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff John Jones. The judge will compute the recovery of each plaintiff under the law and the percentages of fault you assess.

Instruction No. 13
(See MAI 21.05)

In these instructions, you are told to itemize any damages you award by the categories set forth in the verdict form.

The phrase "past economic damages" means those damages incurred in the past for pecuniary harm such as medical expenses for necessary drugs, therapy, and for medical, surgical, nursing, x-ray, dental, custodial, and other health and rehabilitative services, and for past lost earnings and for past lost earning capacity.

The phrase "past non-economic damages" means those damages arising in the past from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of consortium, and loss of capacity to enjoy life.

The phrase "future medical damages" means those damages arising in the future for medical expenses such as necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial, and other health and rehabilitative services.

The phrase "future economic damages" means those damages arising in the future from pecuniary harm such as lost earnings and lost earning capacity.

The phrase "future non-economic damages" means those damages arising in the future from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, loss of consortium, and loss of capacity to enjoy life.

VERDICT
(See MAI 36.22 and 37.09)

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%; otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

Defendant Smith	________%	(zero to 100%)
Plaintiff Jones	________%	(zero to 100%)
TOTAL	________%	(zero OR 100%)

Note: Complete the following paragraphs if you assessed a percentage of fault to defendant. Complete by writing in the amount of damages, if any, for each of the following itemized categories. If you do not find that a particular plaintiff was damaged in a particular category, write “none” in that category. The total damages for each plaintiff must equal the total of the itemized damage amounts you have assessed.

On the claim of plaintiff John Jones for personal injury, we, the undersigned jurors, find John Jones’ total damages, disregarding any fault on the part of plaintiff John Jones, as follows:

For past economic damages including past medical damages	$________
For past non-economic damages	$________
For future medical damages	$________
For future economic damages excluding future medical damages	$________
For future non-economic damages	$________
TOTAL DAMAGES	$________

Note: Complete the following paragraph by writing in the word(s) required by your verdict.

On the claim of plaintiff Mary Jones for damages due to injury to her husband, John Jones, we, the undersigned jurors, find that plaintiff Mary Jones ____________ (“did” or “did not”) sustain damage as a direct result of injury to her husband.

Note: Complete the following paragraph only if the above finding is that plaintiff Mary Jones “did” sustain such damage.

We, the undersigned jurors, find the total amount of plaintiff Mary Jones' damages due to injury to her husband, John Jones, disregarding any fault on the part of plaintiff John Jones, as follows:

For past non-economic damages	$________
For future non-economic damages	$________
TOTAL DAMAGES	$________

Note: The judge will compute the recovery of each plaintiff under the law and the percentages of fault you assess.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________

Committee Comment (1991 New)

A. Illustration 35.18 demonstrates an appropriate comparative fault submission in an action against a health care provider where there is an injury claim along with a derivative consortium claim. This Illustration demonstrates an appropriate method for combining the elements of a submission peculiar to a claim against a health care provider under §§ 538.205 *et seq.*, RSMo (see MAI Chapter 21 and verdict forms 36.20, 36.21, and 36.22), with the appropriate method for submission of a derivative claim such as loss of consortium (see MAI 21.07, 4.18, 37.08, and 37.09).

B. Instruction No. 12 and the Verdict Form in this Illustration have been tailored to the particular hypothetical fact situation described in this Illustration. If the actual facts in another case allow recovery of other elements of damage, appropriate modification of MAI 21.05 and the verdict form should be made if necessary. See MAI 21.07 for further guidance.

Research References

West's Key Number Digest
Negligence ⚷1746

Annotations

In general 1

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1. In general

The Missouri Supreme Court refused to recognize a cause of action for loss of parental consortium (consortium action by child due to injury to parent) or filial consortium (consortium action by sibling due to injury to another sibling). *Powell v. American Motors Corp.*, 834 S.W.2d 184 (Mo.banc 1992).

35.19 [2021 Revision] Punitive Damages—Bifurcated Trial Under § 510.263—No Comparative Fault—Two Defendants—Apportionment of Fault Between Defendants

Non-employee plaintiff Hurt was injured on a construction site (not a public highway) when Acme road grader backed over him. The road grader was manufactured by Acme without a back up warning device. At the time of the sale of the road grader, Acme had notice of thirty incidents of individuals being backed over by this product. The claim against Acme is for design defect and for punitive damages.

Defendant Driver is sued for failure to keep a careful lookout for compensatory damages only. Driver and Acme have filed cross-claims against each other for apportionment of fault. There is no comparative fault. Acme has requested a bifurcated trial under § 510.263, RSMo.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction Number 1
(Same as MAI 2.01)

Instruction Number 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction Number 4
(See MAI 2.02)

In returning your verdicts, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon plaintiff to cause you to believe that the evidence has clearly and convincingly established the propositions of fact required for the recovery of punitive damages. However, on all other propositions of fact, the burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction Number 6
(See MAI 2.04)

There are two claims submitted to you and each of them contains a separate verdict form. The verdict forms included in these instructions contain directions for completion and will allow you to return the permissible verdicts in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

* * * * * * *

Instruction Number 7
(See MAI 2.05, Modified)

Instructions 7 through 15 and general instructions 1 through 6 apply to the claim of plaintiff Hurt for *compensatory damages* for personal injury *and to the determination of the liability of defendant Acme for punitive damages.* Use Verdict A to return your verdict on *these issues.*

Instruction Number 8
(See MAI 25.04, Modified, MAI 19.01)

On the claim of plaintiff Hurt for compensatory damages for personal injury against defendant Acme, your verdict must be for plaintiff Hurt if you believe[1]:

First, defendant Acme sold the road grader in the course of defendant's business, and

Second, the road grader was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and

Third, the road grader was used in a manner reasonably anticipated, and

Fourth, such defective condition as existed when the road grader was sold directly caused or directly contributed to cause damage to plaintiff.

Instruction Number 9
(Converse Omitted)

Instruction Number 10
(See MAI 17.01, MAI 17.05, MAI 19.01)

On the claim of plaintiff Hurt for compensatory damages for personal injury against defendant Driver, your verdict must be for plaintiff Hurt if you believe[1]:

First, defendant Driver failed to keep a careful lookout, and

Second, defendant Driver was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff Hurt.

Instruction Number 11
(Converse Omitted)

Instruction Number 12
(See MAI 11.07)

The term "negligent" or "negligence" as used in these instructions means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Instruction Number 13
(See MAI 4.01, Modified)

If you find in favor of plaintiff and against one or more defendants, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future that the occurrence mentioned in the evidence directly caused or directly contributed to cause.

Instruction Number 14
(See MAI 10.04, Modified)

If you find in favor of plaintiff Hurt and against defendant Acme under Instruction Number 8[2], and if you believe that:

First, at the time defendant Acme sold the road grader, defendant knew of the defective condition and danger submitted in Instruction Number 8, and

Second, defendant Acme thereby showed complete indifference to or conscious disregard for the safety of others, then, *in Verdict A, you may find that defendant Acme is liable for punitive damages.*

You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others.

If you find that defendant Acme is liable for punitive damages in this stage of the trial, you will be given further instructions for assessing the amount of punitive damages in the second stage of the trial.

Instruction Number 15
(Converse Omitted, See MAI 33.16)[3]

Verdict A
(See MAI 36.11 (1980 Revision), Modified)[4]

Note: Complete this form as required by your verdict.

On the claim of plaintiff Hurt *for compensatory damages for personal injury* against defendant Acme, we, the undersigned jurors, find in favor of:

____

Plaintiff Hurt OR Defendant Acme

On the claim of plaintiff Hurt *for compensatory damages for personal injury* against defendant Driver, we, the undersigned jurors, find in favor of:

____

Plaintiff Hurt OR Defendant Driver

Note: Complete the following paragraph only if one or more of the above findings is in favor of plaintiff Hurt.

We, the undersigned jurors, assess the *compensatory* damages of plaintiff Hurt at $________________ *(stating the amount).*

Note: *If you found in favor of plaintiff Hurt and against defendant Acme, complete the following paragraph by writing in the word(s) required by your verdict.*

We, the undersigned jurors, find that defendant Acme __________ *liable for punitive damages.*
("is" or "is not")

Note: All jurors who agree to the above must legibly sign or print their names below.

________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________

* * * * * * *

Instruction Number 16
(See MAI 2.05)

Instructions 16 through 17 and general instructions 1 through 6 apply to the claim between defendants for apportionment of fault. Use Verdict B to return your verdict on this claim.

Instruction Number 17
(See MAI 4.12, Modified)

If Verdict A is in favor of plaintiff Hurt and against both defendants, you must assess the proportion of fault which each defendant listed in Verdict B has for plaintiff's *compensatory* damages.

Verdict B
(See MAI 36.15, Modified)

Note: Complete this form if fault is to be apportioned.

On the claim between defendants for assessment of the proportions of fault for plaintiff Hurt's *compensatory* damages assessed in Verdict A, we, the undersigned jurors, find:

Note: Complete by writing in the percentage of the relative fault for each defendant you believe to be at fault. The total of the percentages you assess must not exceed 100%.

Defendant Acme is ________% at fault.
Defendant Driver is ________% at fault.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________

* * * * * * *

Instruction Number 18[5]
(See MAI 2.05, Modified)

Instructions 18 through 19 and *general instructions 1 through 6 apply to the determination of the amount of punitive damages to be assessed against defendant Acme. Use Verdict C to return your verdict as to the amount of punitive damages*[6]

Instruction Number 19[3]
(See MAI 10.04, Modified)

In addition to any *compensatory damages you assessed in Verdict A,* you may *assess* an additional amount as punitive damages in such sum as you believe will serve to punish defendant Acme *for the conduct for which you found that defendant Acme is liable for punitive damages* and *will serve* to deter defendant Acme and others from like conduct.

You may consider harm to others in determining whether defendant's conduct showed complete indifference to or conscious disregard for the safety of others. However, in determining the amount of any punitive damage award, you must not include damages for harm to others who are not parties to this case.

Verdict C
(Not in MAI)

Note: Complete this form as required by your verdict.

*We, the undersigned jurors, assess punitive damages against defendant Acme at $*________ (stating the amount, or, if none, write the word "none").

Note: All jurors who agree to the above must legibly sign or print their names below.

________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________

Notes on Use (1992 New)

This Illustration is intended to provide guidance for the submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo, which was enacted as part of House Bill 700, 84th General Assembly, 1st Regular Session (1987), and applies only to causes of action accruing after July 1, 1987.

Italicized words and phrases in this Illustration demonstrate the modifications and additions to existing MAI instructions to accomplish bifurcation when required by § 510.263. Essentially, § 510.263 requires that, on request of any party, a civil action involving punitive damages shall be bifurcated. In the first phase, the jury is to determine: (1) liability for compensatory damages; (2) the amount of compensatory (or nominal) damages; and (3) liability for (but not the amount of) punitive damages. In the second stage of trial, the jury is to determine the amount of punitive damages.

This Illustration is not intended to take positions on the amount or type of proof necessary to support a punitive damage submission or the applicable legal standards for different torts that may support punitive damages. Case law must be consulted on such issues.

1. Comparative fault submissions under MAI 37.01 may also be modified in accordance with this Illustration for submission of punitive damages in such cases.

2. In a comparative fault case, the lead-in phrase "If you assess a percentage of fault to defendant Acme," should be substituted for the existing lead-in phrase in this Illustration.

In a comparative fault submission of punitive damages, the phrase "whether or not plaintiff was partly at fault" may be added after the phrase "then you may find defendant liable for punitive damages."

3. Defendant is entitled to a converse of a punitive damage instruction. See MAI 33.16. However, the converse for a punitive damage instruction modified for a bifurcated trial must also be modified. Counsel should consult MAI 33.01, General Comment, which advises that the pattern instruction for any converse is the *actual* instruction that is being conversed. The Committee takes no position as to whether defendant is entitled to a converse of Instruction Number 19 (on the amount of punitive damages) since the defendant may give a converse to Instruction Number 14 (on liability for punitive damages).

4. In a comparative fault case, MAI 37.07 may be modified in accordance with this Illustration to allow jury findings on punitive damage issues. In any case involving multiple defendants against whom punitive damages are submissible, both the punitive damage instructions (Instruction Number 14 and Instruction Number 19 in this Illustration), and Verdicts A and C will need further modification. See the guidance provided in MAI 10.03 and add MAI 10.03 as the last paragraph to the equivalent of Instruction Number 19 in this Illustration.

5. The final package of instructions for the assessment of the amount of punitive damages will only be given to the jury if one or more of the defendants has been found liable for punitive damages in Verdict A. In the second stage of trial, the jury should be given only the general instructions (Instructions 1 through 6 in this Illustration), and the new instructions relating to the amount of punitive damages (Instructions 18 and 19 in this Illustration), and the verdict form as to the amount (Verdict C in this Illustration).

6. In the event multiple defendants have been found liable for punitive damages in the first phase of trial, Instruction Number 18 should be modified to identify those defendants.

Committee Comment (2012 Revision)

A. Under *Menaugh v. Resler Optometry, Inc.*, 799 S.W.2d 71 (Mo.banc 1990), the amount of punitive damages assessed against a defendant is *not* to be reduced by any percentage of fault assessed to plaintiff in a comparative fault case.

B. Caution: The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230, RSMo (repealed by H.B. 393), and (2) possibly the revisions by H.B. 393 with respect to punitive damages in §§ 510.265 and 537.067, which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067 on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

C. Caution: Section 538.210.5, RSMo, provides that punitive damages may be assessed against a health care provider in actions accruing after February 3, 1986, only where the health care provider demonstrated willful, wanton, or malicious misconduct. The Committee takes no position on the constitutionality of Senate Bill 663, 1986 Mo. Laws 879.

D. The Committee takes no position on the constitutionality of House Bill 700, 84th General Assembly, 1st Regular Session (1987), of which § 510.263, RSMo, was a part, and which was perpetuated in House Bill 393 of the 93rd General Assembly (2005) with limitations on punitive damages in certain cases.

E. The trial judge should exercise sound discretion in affording attorneys appropriate leeway during the various stages of trial to describe to the jury the proceedings contemplated by § 510.263, RSMo.

F. After the first stage of trial, there may be additional evidence in the second stage relating to the net worth of the defendants found liable for punitive damages. There may also be additional argument by counsel as to the amount (possibly "zero") to be assessed by the jury as punitive damages. The Committee takes no position as to whether additional evidence, other than net worth, may be admissible in the second stage of trial.

G. The method in this Illustration of splitting MAI 10.04 and modifying its component parts for submission of punitive damages in a bifurcated trial pursuant to § 510.263 may be utilized with any punitive damage instruction in Chapter 10.

H. The word "assess" is used in Instruction Number 18 rather than the phrase "award plaintiff" because the award of punitive damages may not inure entirely to the benefit of the plaintiff. § 537.675, RSMo, provides a mechanism for the State of Missouri to obtain one-half of any final judgment awarding punitive damages. The Committee takes no position on the constitutionality of § 537.675 or whether the potential interest of the State of Missouri and the "Tort Victims Compensation Fund" created by § 537.675.1 may be argued to the jury.

Historical Note

(This Illustration was originally created under the law prior to the enactment of H.B. 393 (Laws 2005), which has an effective date of August 28, 2005. H.B. 393 contains two sections: § 510.265, RSMo, and § 537.067, RSMo, which may or may not affect the method of submitted jury instructions on punitive damages).

Research References

West's Key Number Digest
Negligence ⚷1746

35.20 [2021 Revised] Medical Malpractice—Minor Injured—Derivative Claim—No Comparative Fault

Megan Smith, a minor, sustained permanent injury during an operative procedure for which anesthetic was administered by Horace Jones, MD. It is alleged that defendant failed to adequately monitor vital signs and administered excessive anesthetic during surgery. In addition to the minor's claim for personal injury, John and Julie Smith, her parents, have joined the action with their derivative parental claim but have allowed their daughter to recover past and future medical expense in her claim.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction Number 1
(Same as MAI 2.01)

Instruction Number 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction Number 4
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inference derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction Number 5
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction Number 6
(See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction Number 7
(See MAI 11.06)

The term "negligent" or "negligence" as used in these instructions means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by the members of defendant's profession.

Instruction Number 8
(See MAI 21.01, MAI 19.01)

Your verdict must be for plaintiff Megan Smith and against defendant Jones if you believe:

First, defendant Horace Jones, MD, either:

> administered excessive anesthetic to Megan Smith during induction of anesthesia, or

failed to adequately monitor the vital signs of Megan Smith during induction of anesthesia, and

Second, Defendant, in any one or more of the respects submitted in Paragraph First, was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to Megan Smith.

Instruction Number 9
(Converse Omitted)

Instruction Number 10
(See MAI 31.04)

If you find in favor of plaintiff Megan Smith on her claim for personal injuries, and if you believe that plaintiffs John and Julie Smith sustained damage as a direct result of injury to their child, then in your verdict you must find that plaintiffs John and Julie Smith did sustain such damage.

Instruction Number 11
(Converse Omitted)

Instruction Number 12
(See MAI 21.03, MAI 21.07, MAI 4.18)

If you find in favor of plaintiff Megan Smith, then you must award her such sum as you believe will fairly and justly compensate her for any damages you believe she sustained and is reasonably certain to sustain in the future that the occurrence mentioned in the evidence directly caused or directly contributed to cause.

If you further find that plaintiffs John and Julie Smith did sustain damage as a direct result of injury to their child, Megan Smith, you must award plaintiffs John and Julie Smith such sum as you believe will fairly and justly compensate them for any damages due to injury to their child which you believe they sustained and are reasonably certain to sustain in the future that the occurrence mentioned in the evidence directly caused or directly contributed to cause.

Any damages you award must be itemized by the categories set forth in the verdict form on each claim.

Instruction Number 13
(See MAI 21.05)

In these instructions, you are told to itemize any damages you award by the categories set forth in the verdict form.

The phrase "past economic damages" means those damages incurred in the past for pecuniary harm such as medical expenses for necessary drugs, therapy, and for medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitative services, and for past lost earnings and for past lost earning capacity.

The phrase "past non-economic damages" means those damages incurred in the past from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

The phrase "future medical damages" means those damages arising in the future for medical expenses such as necessary drugs, therapy, and medical, surgical, nursing, X-ray, dental, custodial, and other health and rehabilitative services.

The phrase "future economic damages" means those damages arising in the future from pecuniary harm such as lost earnings and lost earning capacity.

The phrase "future non-economic damages" means those damages arising in the future from non-pecuniary harms such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

Verdict
(See MAI 36.20, MAI 36.23)

Note: Complete this form by writing in the names required by your verdict.

On the claim of plaintiff Megan Smith for personal injuries against defendant Horace Jones, MD, we, the undersigned jurors find in favor of:

____

(Plaintiff Megan Smith) or (Defendant Horace Jones, MD)

Note: Complete the following only if the above finding is in favor of plaintiff Megan Smith. Complete by writing in the amount of damages, if any, for each of the following itemized categories. If you do not find that plaintiff has damages in a particular category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have assessed.

We, the undersigned jurors, assess the damages of plaintiff Megan Smith as follows:

For past economic damages including past medical damages	$________
For past non-economic damages	$________
For future medical damages	$________
For future economic damages excluding future medical damages	$________
For future non-economic damages	$________
TOTAL DAMAGES	$________

Note: Complete the following paragraph by writing in the word(s) required by your verdict.

On the claim of plaintiffs John and Julie Smith for damages due to injury to their child, we, the undersigned jurors, find that plaintiffs John and Julie Smith ______________ (“did” or “did not”) sustain damages as a direct result of injury to their child.

Note: Complete the following paragraph only if the above finding is that plaintiffs John and Julie Smith “did” sustain such damage.

We, the undersigned jurors, assess the damages of plaintiffs John and Julie Smith due to injury to their child as follows:

For past economic damages excluding past medical damages $________

For future economic damages excluding future medical damages $________

TOTAL DAMAGES $________

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________

Committee Comment (1998 New)

A. This Illustration 35.20 demonstrates an appropriate submission in an action against a health care provider where there is an injury claim along with a derivative claim but no claim of comparative fault. (For an illustration of a case with a claim for comparative fault, see Illustration 35.18). This Illustration demonstrates an appropriate method for combining the elements of a submission peculiar to a claim against a health care provider under §§ 538.205 *et seq.*, RSMo. (See MAI Chapter 21 and verdict forms, MAI 36.20 and MAI 36.21), with the appropriate method for submission of a derivative claim such as a parental claim (See MAI 21.03, 21.07 and 4.18.)

B. The verdict form in this Illustration has been tailored to the particular hypothetical fact situation described in this Illustration. The Notes on Use to MAI 21.05 allow appropriate modification of the elements of recoverable damages in one or more definitions; but, solely for the sake of simplicity, the Committee chose not to do so in this Illustration.

Research References

West's Key Number Digest
Negligence ⚷1746

35.21 [2021 Revision] Health Care Providers—Settling Tortfeasor—Apportionment of Fault Under § 538.230—With Comparative Fault (Repealed by H.B. 393 (2005))

CAUTION: H.B. 393 repealed § 538.230 in 2005. Thus, for cases filed after August 28, 2005, there is no apportionment of fault to a settling tortfeasor in medical malpractice cases. Illustrations 35.21 and 35.22 and the Committee Comments remain in this edition of MAI for cases under § 538.230 prior to repeal by H.B. 393 and for historical purposes.

Dr. Edward Smith performed surgery on plaintiff John Jones. Plaintiff claims that Smith left a sponge in plaintiff's abdomen during surgery. Smith claims that plaintiff failed to advise Smith of abdominal distention. Plaintiff previously settled with Nurse Davis, a surgical nurse. Plaintiff obtained the settlement with Nurse Davis on the claim that the nurse failed to perform a sponge count. Defendant Smith now makes the same claim with respect to the sponge count by Nurse Davis. He seeks an apportionment of fault under prior § 538.230, RSMo, as to Nurse Davis as a "released party" and as to plaintiff Jones for his alleged comparative fault.

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction No. 1
(Same as MAI 2.01)

Instruction No. 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction No. 4
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any such proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction No. 6
(See MAI 11.06 (Modified))

The term "negligent" or "negligence" as used in these instructions with respect to a physician or nurse means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of those health care providers' respective professions.

Instruction No. 7
(See MAI 11.07 (Modified))

The term "negligent" or "negligence" as used in these instructions with respect to a patient means the failure to use ordinary care. The phrase "ordinary care" means that degree of care that an ordinarily careful person would use under the same or similar circumstances.

Instruction No. 8
(See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction No. 9
(See MAI 21.01, MAI 37.01, MAI 19.01)

In your verdict, you must assess a percentage of fault to defendant Smith, whether or not plaintiff John Jones or Nurse Davis was partly at fault, if you believe:

First, defendant Smith left a sponge in plaintiff's abdomen during surgery, and

Second, defendant Smith was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

Instruction No. 10
(Converse Omitted)

Instruction No. 11
(See MAI 21.01, MAI 37.01, MAI 19.01, (Modified))

If you assess a percentage of fault to Defendant Smith under Instruction No. 9, then you must assess a percentage of fault to Nurse Davis on Defendant Smith's claim that Nurse Davis is partly at fault if you believe:

First, Nurse Davis failed to perform a sponge count during surgery, and

Second, Nurse Davis was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

(Note: *The burden of proof and the responsibility to tender this verdict director is on the party seeking an assessment of a percentage of fault to a released person.)*

Instruction No. 12
(Converse Omitted)

(Note: *Since Nurse Davis settled with plaintiff, and is not a party to the lawsuit, plaintiff may submit a converse to the defendant's tendered verdict directing instruction regarding the negligence of the settling tortfeasor.)*

Instruction No. 13
(See MAI 37.02)

In your verdict, you must assess a percentage of fault to plaintiff John Jones, whether or not defendant Smith or Nurse Davis was partly at fault, if you believe:

First, plaintiff John Jones failed to advise Dr. Smith of abdominal distention, and

Second, plaintiff John Jones was thereby negligent, and

Third, such negligence of plaintiff John Jones directly caused or directly contributed to cause any damage plaintiff John Jones may have sustained.

Instruction No. 14
(Converse Omitted)

Instruction No. 15
(See MAI 21.04, Modified in accordance with *Carlson v. K-Mart*, 979 S.W.2d 145 (Mo.banc 1998))

If you assess a percentage of fault to defendant Smith, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future that the sponge incident directly caused or directly contributed to cause. You must state such total amount of plaintiff's damages in your verdict, and you must itemize those total damages by the categories set forth in the verdict form.

In determining the total amount of plaintiff's damages and in itemizing those total damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff [or Nurse Davis]. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff [or Nurse Davis *(see Note following Instruction No. 16)*].

Instruction No. 16
(See MAI 21.06)

Plaintiff's claim against Nurse Davis has been settled. In determining the total amount of plaintiff's damages and in assessing percentages of fault, you are not to consider such settlement. The total damages assessed by you on plaintiff's claim against the defendant Smith will be reduced by the judge by any percentage of fault you assess to Nurse Davis.

(Note: This instruction, based on MAI 21.06, will be given only as a separate instruction if the jury has knowledge of the settlement from the evidence or a trial incident. If there is no such knowledge, the preceding damage instruction No. 15 should be modified by adding the phrase "or Nurse Davis" to the last two sentences.)

Instruction No. 17
(See MAI 21.05)

In these instructions, you are told to itemize any damages you award by the categories set forth in the verdict form.

The phrase "past economic damages" means those damages incurred in the past for pecuniary harm such as medical expenses for necessary drugs, therapy, and for medical, surgical, nursing, x-ray, dental, custodial, and other health and rehabilitative services, and for past lost earnings and for past lost earning capacity.

The phrase "past non-economic damages" means those damages arising in the past from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

The phrase "future medical damages" means those damages arising in the future for medical expenses such as necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial, and other health and rehabilitative services.

The phrase "future economic damages" means those damages arising in the future from pecuniary harm such as lost earnings and lost earning capacity.

The phrase "future non-economic damages" means those damages arising in the future from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

VERDICT
(See MAI 36.22)

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%; otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff John Jones for personal injury against defendant Smith, we, the undersigned jurors, assess percentages of fault as follows:

Defendant Smith	________%	(zero to 100%)
Nurse Davis	________%	(zero to 100%)
Plaintiff Jones	________%	(zero to 100%)
TOTAL	________%	(zero *or* 100%)

Note: Complete the following if you assessed a percentage of fault to defendant Smith. Complete by writing in the amount of damages, if any, for each of the following itemized categories. If you do not find that plaintiff has damages in a particular category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have assessed.

We, the undersigned jurors, disregarding any fault on the part of plaintiff or Nurse Davis, find the total damages of plaintiff Jones as follows:

For past economic damages including past medical damages	$________
For past non-economic damages	$________
For future medical damages	$________
For future economic damages excluding future medical damages	$________
For future non-economic damages	$________
TOTAL DAMAGES	$________

Note: The judge will compute the plaintiff's recovery under the law and the percentages of fault you assess.

Note: All jurors who agree to the above must legibly sign or print their names below.

Committee Comment (2012 Revision)

CAUTION: H.B. 393 repealed § 538.230 in 2005. Thus, for cases filed after August 28, 2005, there is no apportionment of fault to a settling tortfeasor in medical malpractice cases. Illustrations 35.21 and 35.22 and the Committee Comments remain in this edition of MAI for cases under § 538.230 prior to repeal by H.B. 393 and for historical purposes.

A. Illustrations 35.21 and 35.22 demonstrate appropriate methods of submission of apportionment of fault under § 538.230, RSMo, (repealed by H.B. 393 (2005)) in situations involving comparative fault of plaintiff (Illustration 35.21) and *no* comparative fault of plaintiff (Illustration 35.22). These illustrations are for use *only* in actions involving health care providers under §§ 538.205 *et seq.*, RSMo prior to the enactment of H.B. 393. These illustrations are not to be used in other apportionment of fault cases. For claims submitting apportionment of fault under *Missouri Pacific R. Co. v. Whitehead & Kales Co.*, 566

S.W.2d 466 (Mo.banc 1978) (in cases not involving health care providers under §§ 538.205 *et seq.*), see MAI 4.12, 4.13, 4.14, 36.14, and 36.15; and see Illustrations 35.02, 35.03, 35.05, 35.15, and 35.19.

B. In actions other than those against health care providers under §§ 538.205 *et seq.*, RSMo, apportionment of fault issues among defendants or third party defendants have no direct relevance to liability and damage issues in plaintiff's claim in light of the doctrine of joint and several liability. *See* § 537.067, RSMo. Thus, traditional apportionment of fault issues under *Whitehead & Kales* should not be commingled with the instructions and verdict form pertinent to plaintiff's claim. In cases involving comparative fault of plaintiff, where all parties from whom apportionment is sought have been sued by plaintiff, all necessary percentages of fault of all parties on all issues (plaintiff's claim and apportionment claim) are determined in the verdict form in plaintiff's claim, and no separate package is necessary to submit apportionment issues.

C. However, the above discussion of the submission of apportionment issues under *Whitehead & Kales* is not applicable to actions involving health care providers under §§ 538.205 *et seq.*, RSMo By specific statutory directive in § 538.230, prior to the enactment of H.B. 393, in actions against health care providers, "where fault is apportioned among the parties and persons released, the court, unless otherwise agreed by all the parties, shall instruct the jury to apportion fault among such persons and parties . . .." The findings of percentages of fault in such cases, unlike the traditional *Whitehead & Kales* cases, do affect the judgment on plaintiff's claim. Under subsections 2 and 3 of § 538.230, the jury verdict on plaintiff's claim is reduced by the percentage of fault assessed to a settling tortfeasor, and a non-settling tortfeasor is jointly and severally liable only for percentages of fault of other defendants whose apportioned percentage of fault is "equal to or less than such defendant." In light of this statutory interplay between "apportionment", fault of a "settling tortfeasor", and "joint and several liability" under § 538.230, the Committee believes it is most simple and efficient to submit all such issues in a single package (that submitting plaintiff's claim) whether or not the comparative fault of plaintiff is at issue, as demonstrated in these Illustrations 35.21 and 35.22.

Historical Note

(This Illustration was originally created under the law prior to the enactment of H.B. 393 (Laws 2005), which has an effective date of August 28, 2005. H.B. 393 repealed § 538.230 in 2005. Thus, for cases filed after August 28, 2005, there is no apportionment of fault to a settling tortfeasor in medical malpractice cases. Illustrations 35.21 and 35.22 and the Committee Comments remain in this edition of MAI for cases under § 538.230 prior to repeal by H.B. 393 and for historical purposes).

Research References

West's Key Number Digest
Negligence ⚿1746

35.22 [2021 Revision] Health Care Providers—Settling Tortfeasor—Apportionment of Fault Under § 538.230—No Comparative Fault of Plaintiff (Repealed by H.B. 393)

CAUTION: H.B. 393 repealed § 538.230 in 2005. Thus, for cases filed after August 28, 2005, there is no apportionment of fault to a settling tortfeasor in medical malpractice cases. Illustrations 35.21 and 35.22 and the Committee Comments remain in this edition of MAI for cases under § 538.230 prior to repeal by H.B. 393 and for historical purposes.

Dr. Edward Smith performed surgery on plaintiff John Jones. Plaintiff claims that Smith left a sponge in plaintiff's abdomen during surgery. Plaintiff previously settled with Nurse Davis, a surgical nurse. Plaintiff obtained the settlement with Nurse Davis on the claim that the nurse failed to perform a sponge count. Defendant Smith now makes the same claim with respect to the sponge count by Nurse Davis. He also seeks an apportionment of fault under § 538.230, RSMo (repealed by H.B. 393 (2005)), as to Nurse Davis as a "released party."

E1.01

Before jury selection, a description of the case may be read to the jury panel as an Early Case Summary to assist the panel in understanding the basics of the case. E1.01 is *not* mandatory. E1.01 is not a jury instruction although boilerplate instructions such as the burden of proof or the definition of negligence may be incorporated as shown in E1.01. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

See Illustration 35.04 for an example of E1.01 tailored for the hypothetical facts of that Illustration.

2.00(A)

Before jury selection, the trial judge may read the Recommended Explanatory Instruction at MAI 2.00(A). MAI 2.00(A) is not mandatory. It should not be numbered or read to the jury with other numbered instructions at the conclusion of the case. It may be included in juror notebooks if permitted by the trial judge under Rule 69.03. It may also be included in each individual juror packet of instructions if distributed in accordance with Committee Comment I to MAI 2.01.

2.00(B)

Admonitions — if admonitions are appropriate, see MAI 2.00(B) and see the guidance provided for the use of admonitions provided in the General Comments to MAI 2.00(B).

2.00(C)

Before jury selection, this instruction, also contained at MAI 2.03(A), should be read in all civil cases prior to jury selection.

Instruction No. 1
(Same as MAI 2.01)

Instruction No. 2
(See MAI 2.03)

As you remember, the court read to you a general instruction before the presentation of any evidence in this case. The court will not repeat that instruction at this time. However, that instruction and the additional instructions, to be given to you now, constitute the law of this case and each such instruction is equally binding upon you. You should consider each instruction in light of and in harmony with the other instructions, and you should apply the instructions as a whole to the evidence. Words or phrases which are not otherwise defined for you as part of these instructions should be given their ordinary meaning. The order in which the instructions are given is no indication of their relative importance. All of the instructions are in writing and will be available to you in the jury room.

Instruction No. 3
(Same as MAI 2.03(A))

Instruction No. 4
(See MAI 2.02)

In returning your verdict, you will form beliefs as to the facts. The court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Instruction No. 5
(See MAI 3.01)

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any such proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

Instruction No. 6
(See MAI 11.06)

The term “negligent” or “negligence” as used in these instructions with respect to a physician or nurse means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by members of those health care providers’ respective professions.

Instruction No. 7
(See MAI 2.04)

The verdict form included in these instructions contains directions for completion and will allow you to return the permissible verdict in this case. Nine or more of you must agree in order to return any verdict. A verdict must be signed by each juror who agrees to it.

Instruction No. 8
(See MAI 21.01, MAI 37.01, MAI 19.01)

In your verdict, you must assess a percentage of fault to defendant Smith, whether or not Nurse Davis was partly at fault, if you believe:

First, defendant Smith left a sponge in plaintiff's abdomen during surgery, and

Second, defendant Smith was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

Instruction No. 9
(Converse Omitted)

Instruction No. 10
(See MAI 21.01, MAI 37.01, MAI 19.01, (Modified))

If you assess a percentage of fault to Defendant Smith under Instruction No. 8, then you must assess a percentage of fault to Nurse Davis on Defendant Smith's claim that Nurse Davis is partly at fault, if you believe:

First, Nurse Davis failed to perform a sponge count during surgery, and

Second, Nurse Davis was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

(Note: The burden of proof and the responsibility to tender this verdict director is on the party seeking an assessment of a percentage of fault to a released person.)

Instruction No. 11
(Converse Omitted)

(Note: Since Nurse Davis settled with plaintiff, and is not a party to the lawsuit, plaintiff may submit a converse to the defendant's tendered verdict directing instruction regarding the negligence of the settling tortfeasor.)

Instruction No, 12
(See MAI 21.04, Modified in accordance with *Carlson v. K-Mart*, 979 S.W.2d 145 (Mo.banc 1998))

If you assess a percentage of fault to defendant Smith, then, disregarding any fault on the part of Nurse Davis, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future that the sponge incident directly caused or directly contributed to cause. You must state such total amount of plaintiff's damages in your verdict, and you must itemize those total damages by the categories set forth in the verdict form.

In determining the total amount of plaintiff's damages and in itemizing those total damages, you must not reduce such damages by any percentage of fault you may assess to Nurse Davis. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to Nurse Davis.

Instruction No. 13
(See MAI 21.06)

Plaintiff's claim against Nurse Davis has been settled.

In determining the total amount of plaintiff's damages and in assessing percentages of fault, you are not to consider such settlement.

(Note: *This instruction, based on MAI 21.06, will be given only as a separate instruction if the jury has knowledge of the settlement from the evidence or a trial incident. The third sentence of MAI 21.06 has been deleted from this instruction to avoid repetition of information given to the jury in Instruction No. 12.)*

Instruction No. 14
(See MAI 21.05)

In these instructions, you are told to itemize any damages you award by the categories set forth in the verdict form.

The phrase "past economic damages" means those damages incurred in the past for pecuniary harm such as medical expenses for necessary drugs, therapy, and for medical, surgical, nursing, x-ray, dental, custodial, and other health and rehabilitative services, and for past lost earnings and for past lost earning capacity.

The phrase "past non-economic damages" means those damages arising in the past from non-pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

The phrase "future medical damages" means those damages arising in the future for medical expenses such as necessary drugs, therapy, and medical, surgical, nursing, x-ray, dental, custodial, and other health and rehabilitative services.

The phrase "future economic damages" means those damages arising in the future from pecuniary harm such as lost earnings and lost earning capacity.

The phrase "future non-economic damages" means those damages arising in the future from pecuniary harm such as pain, suffering, mental anguish, inconvenience, physical impairment, disfigurement, and loss of capacity to enjoy life.

VERDICT
(See MAI 36.22)

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%: otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff John Jones for personal injury, we, the undersigned jurors, assess percentages of fault as follows:

Defendant Smith	________%	(zero to 100%)
Nurse Davis	________%	(zero to 100%)
TOTAL	________%	(zero *or* 100%)

Note: Complete the following if you assessed a percentage of fault to defendant Smith. Complete by writing in the amount of damages, if any, for each of the following itemized categories. If you do not find that plaintiff has damages in a particular category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have assessed.

We, the undersigned jurors, disregarding any fault on the part of Nurse Davis, find the total damages of plaintiff Jones as follows:

For past economic damages including past medical damages	$______
For past non-economic damages	$______
For future medical damages	$______
For future economic damages excluding future medical damages	$______
For future non-economic damages	$______
TOTAL DAMAGES	$______

Note: The judge will compute the plaintiff's recovery under the law and the percentages of fault you assess.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________
____________________ ____________________
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____________________ ____________________

Committee Comment (2012 Revision)

CAUTION: H.B. 393 repealed § 538.230 in 2005. Thus, for cases filed after August 28, 2005, there is no apportionment of fault to a settling tortfeasor in medical malpractice cases. Illustrations 35.21 and 35.22 and the Committee Comments remain in this edition of MAI for cases under § 538.230 prior to repeal by H.B. 393 and for historical purposes.

A. Illustrations 35.21 and 35.22 demonstrate appropriate methods of submission of apportionment of fault under § 538.230, RSMo, in situations involving comparative fault of plaintiff (Illustration 35.21) and *no* comparative fault of plaintiff (Illustration 35.22). These illustrations are for use *only* in actions involving health care providers under §§ 538.205 *et seq.*, RSMo. These illustrations are not to be used in other apportionment of fault cases. For claims submitting apportionment of fault under *Missouri Pacific R.Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo.banc 1978) (in cases not involving health care providers under

§§ 538.205 *et seq.*), see MAI 4.12, 4.13, 4.14, 36.14, and 36.15; and see Illustrations 35.02, 35.03, 35.05, 35.15, and 35.19.

B. In actions other than those against health care providers under §§ 538.205 *et seq.*, RSMo, apportionment of fault issues among defendants or third party defendants have no direct relevance to liability and damage issues in plaintiff's claim in light of the doctrine of joint and several liability. See § 537.067, RSMo. Thus, traditional apportionment of fault issues under *Whitehead & Kales* should not be commingled with the instructions and verdict form pertinent to plaintiff's claim. In cases involving comparative fault of plaintiff, where all parties from whom apportionment is sought have been sued by plaintiff, all necessary percentages of fault of all parties on all issues (plaintiff's claim and apportionment claim) are determined in the verdict form in plaintiff's claim and no separate package is necessary to submit apportionment issues.

However, the above discussion of the submission of apportionment issues under *Whitehead & Kales* is not applicable to actions involving health care providers under §§ 538.205 *et seq.* By specific statutory directive in § 538.230 prior to the enactment of H.B. 393, in actions against health care providers, "where fault is apportioned among the parties and persons released, the court, unless otherwise agreed by all the parties, shall instruct the jury to apportion fault among such persons and parties . . .." The findings of percentages of fault in such cases, unlike the traditional *Whitehead & Kales* cases, do affect the judgment on plaintiff's claim. Under subsections 2 and 3 of prior § 538.230, the jury verdict on plaintiff's claim is reduced by the percentage of fault assessed to a settling tortfeasor, and a non-settling tortfeasor is jointly and severally liable only for percentages of fault of other defendants whose apportioned percentage of fault is "equal to or less than such defendant." In light of this statutory interplay between "apportionment," fault of a "settling tortfeasor," and "joint and several liability" under prior § 538.230, the Committee believes it is most simple and efficient to submit all such issues in a single package (that submitting plaintiff's claim) whether or not the comparative fault of plaintiff is at issue, as demonstrated in these Illustrations 35.21 and 35.22.

Historical Note

(This Illustration was originally created under the law prior to the enactment of H.B. 393 (Laws 2005), which has an effective date of August 28, 2005. H.B. 393 repealed § 538.230 in 2005. Thus, for cases filed after August 28, 2005, there is no apportionment of fault to a settling tortfeasor in medical malpractice cases. Illustrations 35.21 and 35.22 and the Committee Comments remain in this edition of MAI for cases under § 538.230 prior to repeal by H.B. 393 and for historical purposes).

Research References

West's Key Number Digest
Negligence ⚷1746

36.00

FORMS OF VERDICT

36.01 Plaintiff vs. Defendant—Personal Injuries Only
36.02 Plaintiff vs. Defendant—Personal Injuries and Property Damage
36.03 Plaintiff vs. Defendant—Personal Injuries and Counterclaim for Personal Injuries [Withdrawn 1980]
36.04 Plaintiff vs. Defendant— Personal Injuries and Property Damage and Counterclaim—Personal Injuries and Property Damage [Withdrawn 1980]
36.05 Plaintiff vs. Two Defendants
36.06 Crossclaim for Indemnity by Surety vs. Principal; by Employer vs. Employee
36.07 Multiple Plaintiffs (Separate Counts) vs. Defendant [Withdrawn 1980]
36.08 Multiple Plaintiffs (Consolidated Cases) vs. Defendant [Withdrawn 1980]
36.09 Plaintiff vs. Defendant— Principal and Interest [Withdrawn 1980]
36.10 Plaintiff vs. Defendant Insurance Company—Interest—Vexatious Refusal Penalty—Attorney Fees
36.11 Plaintiff vs. Defendant—Actual and Punitive Damages
36.12 Plaintiff vs. Two Defendants—Actual and Punitive Damages
36.13 Uninsured Motor Vehicle— Both Individual Tort-Feasor and Insurance Carrier Sued [Withdrawn 2012]
36.14 Uninsured Motor Vehicle— Insurer Only Defendant [Withdrawn 2012]
36.15 Apportionment of Fault Among Defendants
36.16 Liability for Apportionment of Fault Against Party Not Claimed Against by Plaintiff
36.17 Plaintiff vs. Defendant—Will Contest [Withdrawn 2012]
36.17(A) Plaintiff vs. Defendant—Will Contest [Withdrawn 2012]
36.17(B) Plaintiff vs. Defendant—Will Contest—Partial Invalidity [Withdrawn 2012]
36.18 Commitment for Mental Illness
36.19 Plaintiff vs. Defendant—Disputed Partial Settlement
36.20 Actions Against Health Care Providers—Plaintiff vs. Single Defendant—No Comparative Fault
36.21 Actions Against Health Care Providers—Plaintiff vs. Multiple Defendants—No Apportionment of Fault Among Defendants and No Comparative Fault

36.22 Actions Against Health Care Providers—Plaintiff vs. Single or Multiple Defendants—Comparative Fault
36.23 Combined Injury and Derivative Claims
36.24 Actions Against Health Care Providers—Lost Chance of Survival—No Comparative Fault
36.25 Actions Against Health Care Providers—Lost Chance of Survival—Comparative Fault
36.26 Actions Against Health Care Providers—Lost Chance of Recovery (Non-Death) Cases—No Comparative Fault
36.27 Actions Against Health Care Providers—Lost Chance of Recovery (Non-Death) Cases—Comparative Fault
36.28 Paternity Actions

Historical Note

(All Uninsured Motorist Instructions have been collected in Chapter 12 of MAI-Civil. MAI 36.13 has been replaced by MAI 12.07 (2012 Revision). MAI 36.14 has been replaced by MAI 12.08 (2012 Revision).

All Will Contest Instructions have been collected in Chapter 15 of MAI-Civil. MAI 36.17(A) has been replaced by MAI 15.10(A) (2012 Revision). MAI 36.17(B) has been replaced by MAI 15.10(B) (2012 Revision)).

General Notice

The MAI 7th Edition-Civil modified the "Note" on each verdict form so that it reads as follows: "All jurors who agree to the above must legibly sign or print their names below."

Research References

West's Key Number Digest

Insurance 🔑2811, 3554, 3579; Mental Health 🔑7; Negligence 🔑1720, 1750; Parent and Child 🔑205(1), 205(2), 229; Principal and Surety 🔑190(1); Wills 🔑333

A.L.R. Library

A.L.R. Index, Comparative Negligence; Paternity; Wills

West's A.L.R. Digest, Insurance 🔑2811, 3554, 3579; Mental Health 🔑7; Negligence 🔑1720, 1750; Parent and Child 🔑205(1), 205(2), 229; Principal and Surety 🔑190(1); Wills 🔑333

36.01 [1980 Revision] Plaintiff vs. Defendant—Personal Injuries Only

VERDICT ________[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff *(state the name)*.

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* at $________ *(stating the amount)*.

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________ ______________________
______________________ ______________________
______________________ ______________________
______________________ ______________________
______________________ ______________________
______________________ ______________________

Notes on Use (1980 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Verdict forms should not be read by the Court to the jury.

Research References

West's Key Number Digest
Negligence ⚷1750

Annotations

Correcting verdict 1
Deviation 2
Multiple defendants 3

1. Correcting verdict

Where jury presented an ambiguously signed verdict, the trial court properly told jury how verdict should be signed. This was not an improper oral instruction implicitly condemned by MAI 70.01. *McWilliams v. Wright*, 460 S.W.2d 699 (Mo. 1970). Now see MAI 2.06.

2. Deviation

Addition of "and against the plaintiff" to defendant's form of verdict instruction erroneous but harmless. *Salsberry v. Archibald Plumbing & Heating Company*, 587 S.W.2d 907 (Mo.App. W.D. 1979).

3. Multiple defendants

Verdict forms patterned after MAI 36.01 were appropriate in action brought by accountants against clients to recover for accounting and tax services rendered where accountants' theory of quantum meruit required that the jury could not render a verdict against any less than all of the clients on any single count. *Baron v. Lerman*, 719 S.W.2d 72 (Mo.App. E.D. 1986).

Where defendants were joint tortfeasors and there was not varying degrees of culpability, submission of separate verdict forms patterned after MAI 36.01 for each defendant rather than a single form patterned after MAI 36.12 was error since there can be "but one final judgment in the cause, and a judgment against joint tortfeasors must be for a single amount and cannot be split up." *Chambers v. McNair*, 692 S.W.2d 320 (Mo.App. E.D. 1985).

36.02 [1981 Revision] Plaintiff vs. Defendant—Personal Injuries and Property Damage

VERDICT ________[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff *(state the name)* against defendant *(state the name)*[2], we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff *(state the name)*.

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* as follows:

For personal injuries $________ *(stating the amount or, if none, write the word, "none")*.

For property damage $________ *(stating the amount or, if none, write the word, "none")*.

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________

Notes on Use (1980 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Verdict forms should not be read by the Court to the jury.

Research References

West's Key Number Digest
Negligence 🔑1750

Annotations

In general 1

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1. In general

Failure of verdict to separate personal property from personal injury awards was error, but defective verdict was waived by defendant's silence. *Cobb v. Cosby*, 416 S.W.2d 222 (Mo.App. 1967).

36.03 [1980 Withdrawn] Plaintiff vs. Defendant—Personal Injuries and Counterclaim for Personal Injuries

36.04 [1980 Withdrawn] Plaintiff vs. Defendant—Personal Injuries and Property Damage and Counterclaim—Personal Injuries and Property Damage

36.05 [1980 Revision] Plaintiff vs. Two Defendants

VERDICT ________[1]

Note: Complete this form by writing in the name(s) required by your verdict.

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name of one defendant)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name of the other defendant)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

Note: Complete the following paragraph only if one or more of the above findings is in favor of plaintiff *(state the name)*.

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* for personal injuries at $________ *(stating the amount)*.

Note: All jurors who agree to the above must legibly sign or print their names below.

________________________ ________________________
________________________ ________________________
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________________________ ________________________
________________________ ________________________
________________________ ________________________

Notes on Use (1996 Revision)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package which will be the claim to which this verdict is applicable. The identifying phrase should avoid the assumption of disputed facts. See MAI 2.00 General Comment, § F, for a discussion and for examples of the appropriate identifying phrase.

Parenthetical directions to "(state the name)" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Where the two defendants are master and servant, see MAI 18.01 for guidance in preparing the verdict form.

Verdict forms should not be read by the Court to the jury.

Research References

West's Key Number Digest
Negligence 🔑1750

Annotations

In general 1
Master and servant 2

1. In general

In suit by injured union members against union local and its former president arising out of former president's assault of them following union election, trial court's error in refusing local union's request that jury be returned to their deliberations for correction of its verdict warranted reversal and remand for new trial on issue of compensatory damages only; though former president's acts of willfulness and local union's negligence were separate and independent, they were joint tort-feasors insofar as injuries caused were single and indivisible, and jury should have been given other forms of verdicts patterned after MAI Form of Verdict 36.05, which would have allowed single verdict and single amount of compensatory damages for each plaintiff. *Fincher v. Murphy*, 825 S.W.2d 890 (Mo.App. W.D. 1992).

Verdict directing instruction and form of verdict instruction are read together. *Colonial Construction Co. v. Sharp Indus. Inc.*, 421 S.W.2d 551 (Mo.App. 1967).

Proper verdict form against all defendants (MAI 32.05 [Now 36.05]) where all or none, are liable. *Dettler v. Santa Cruz*, 403 S.W.2d 651 (Mo.App. 1966).

2. Master and servant

Where plaintiff sued owner and operator of machinery for operator's negligence it was error to give a form of verdict instruction, MAI 36.05, authorizing a verdict against the owner and in favor of operator, and where jury returned such a verdict the plaintiff was entitled to a new trial. *Lynch v. Hill*, 443 S.W.2d 812 (Mo. 1969). Now see MAI 18.01 for guidance in preparing a verdict form in a master/servant case.

36.06 [1980 Revision] Crossclaim for Indemnity by Surety vs. Principal; by Employer vs. Employee

VERDICT ________[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim of defendant *(state the name)* for indemnity[2] from defendant *(state the name)*, we, the undersigned jurors, find in favor of:

____

(Defendant *(state the name)*) or (Defendant *(state the name)*)

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________

Notes on Use (1980 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

Parenthetical directions to "(state the name)" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Verdict forms should not be read by the Court to the jury.

Research References

West's Key Number Digest
Principal and Surety ⚷190(1)

Annotations

In general 1

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1. In general

Form of verdict against all defendants was proper where they were joint guarantors and not severally liable. *Linwood State Bank v. Lientz*, 413 S.W.2d 248 (Mo. 1967).

36.07 [1980 Withdrawn] Multiple Plaintiffs (Separate Counts) vs. Defendant

36.08 [1980 Withdrawn] Multiple Plaintiffs (Consolidated Cases) vs. Defendant

36.09 [1980 Withdrawn] Plaintiff vs. Defendant—Principal and Interest

36.10 [1980 Revision] Plaintiff vs. Defendant Insurance Company—Interest—Vexatious Refusal Penalty—Attorney Fees

VERDICT ________[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff *(state the name)* for insurance benefits, interest, penalties and attorney fees[2] against defendant, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

Note: Complete the following paragraph only if your verdict is in favor of plaintiff *(state the name)*.

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* as follows:

On the policy $________ *(stating the amount)*.

For interest $________ *(stating the amount or, if none, write the word, "none")*.

For penalty $________ *(stating the amount or, if none, write the word, "none")*.

For attorney fees $________ *(stating the amount or, if none, write the word "none")*.

Note: All jurors who agree to the above must legibly sign or print their names below.

Notes on Use (1980 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

Parenthetical directions to "(state the name)" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Verdict forms should not be read by the Court to the jury.

Committee Comment (1996 New)

A. See MAI 10.08 for the damage instruction for submission of the issue of vexatious refusal to pay by an insurance company.

Research References

West's Key Number Digest
Insurance ⚷3554, 3579

36.11 [1980 Revision] Plaintiff vs. Defendant—Actual and Punitive Damages

VERDICT ________[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff *(state the name).*

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* as follows:

For actual damages $________ *(stating the amount).*

For punitive damages $________ *(state the amount or, if none, write the word, "none").*

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________

____________________ ____________________

____________________ ____________________

____________________ ____________________

____________________ ____________________

____________________ ____________________

Notes on Use (1980 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

Parenthetical directions to "(state the name)" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Verdict forms should not be read by the Court to the jury.

Research References

West's Key Number Digest
Negligence ⚷1750

Annotations

In general 1
Harmless error 2

1. In general

In cases for money damages only, use of the general verdict form in MAI 36.11 (as modified if required by the facts of the case) is mandatory. *Soto v. Costco Wholesale Corp.*, 502 S.W.3d 38 (Mo.App. W.D. 2016).

Submission of verdict form amended by striking reference to punitive damages, pursuant to agreement of the parties, waived any claim that form was improper. *Reece v. Missouri Delta Bank*, 710 S.W.2d 21 (Mo.App. S.D. 1986).

Where plaintiff was entitled to actual damages as a matter of law, and to punitive damages at jury's discretion, it was not necessary to instruct on a verdict form to find for defendant. *Hayden v. Grand River Mut. Tel. Corp.*, 440 S.W.2d 161 (Mo.App. 1969).

2. Harmless error

Where multiple plaintiffs sued for actual and punitive damages they should have modified MAI 36.11 instead of MAI 36.07, but error was harmless where counsel did not object to verdict forms prepared by court. *Bower v. Hog Builders, Inc.*, 461 S.W.2d 784 (Mo. 1970).

36.12 [1980 Revision] Plaintiff vs. Two Defendants—Actual and Punitive Damages

VERDICT ________[1]

Note: Complete this form by writing in the names required by your verdict.

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name of one defendant)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name of the other defendant)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

Note: Complete the following paragraph only if one or more of the above findings is in favor of plaintiff *(state the name)*.

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* as follows:

For actual damages $________ *(stating the amount)*.

For punitive damages against defendant *(state the name)*[3] $________ *(stating the amount or, if none, write the word, "none")*.

For punitive damages against defendant *(state the name)*[3] $________ *(stating the amount or, if none, write the word, "none")*.[4]

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________

Notes on Use (2012 Revision)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

3. The names of the respective defendants will be filled in the punitive damage paragraphs when the instruction is prepared. Include a punitive damage paragraph for each defendant against whom punitive damages may properly be returned; if the jury finds no punitive damages against one or more defendants, they will so indicate by inserting "none" in the space for amount in the paragraph for each such defendant.

4. This form of punitive damage assessment is for use only where it is proper for the jury to return different amounts of punitive damage against the respective defendants by reason of evidence of different degrees of culpability or differences of wealth and ability to pay by the respective defendants. *See State ex rel. Hall v. Cook*, 400 S.W.2d 39 (Mo.banc 1966); MAI 10.03.

Verdict forms should not be read by the Court to the jury.

Committee Comment (2012 New)

The provisions of H.B. 393 (Laws 2005), applicable to actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except (1) on the subject of apportionment of fault in a medical malpractice case to a settling tortfeasor under § 538.230, RSMo, (repealed by H.B. 393), and (2) possibly the revisions by H.B. 393 with respect to punitive damages in §§ 510.265 and 537.067, RSMo which may or may not affect the method of submission of instructions on punitive damages in all cases. The Committee takes no position on the meaning or impact of § 510.265 or § 537.067 on the method of submission of punitive damages. The Committee takes no position on the constitutionality of any provision of H.B. 393.

Research References

West's Key Number Digest
Negligence ⚷1750

Annotations

In general 1

1. In general

Where defendants were joint tortfeasors and there were not varying degrees of culpability, submission of separate verdict forms patterned after MAI 36.01 for each defendant rather than a single form patterned after MAI 36.12 was error since there can be "but one final judgment in the cause, and a judgment against joint tortfeasors must be for a single amount and cannot be split up." *Chambers v. McNair*, 692 S.W.2d 320 (Mo.App. E.D. 1985).

MAI 36.12 verdict form properly followed where jury awarded actual damages against four defendants and punitive damages against two of them. *Tavernaro v. Dunn*, 563 S.W.2d 114 (Mo.App. 1978).

36.13 [2012 Withdrawn] Uninsured Motor Vehicle—Both Individual Tort-Feasor and Insurance Carrier Sued

Historical Note

(MAI 36.13 (1980 Revision) and its related Notes on Use and Committee Comment have been withdrawn. All instructions relating to Uninsured Motor Vehicles have been collected in Chapter 12 of MAI—Civil. MAI 36.13 has been replaced by MAI 12.07 (2012 Revision)).

36.14 [2012 Withdrawn] Uninsured Motor Vehicle—Insurer Only Defendant

Historical Note

(MAI 36.14 (1980 Revision) and its related Notes on Use have been withdrawn. All instructions relating to Uninsured Motor Vehicles have been collected in Chapter 12 of MAI—Civil. MAI 36.14 has been replaced by MAI 12.08 (2012 Revision)).

36.15 [1979 New] Apportionment of Fault Among Defendants

VERDICT ________[1]

Note: Complete this form if fault is to be apportioned.

On the claim[s] *(here use descriptive phrase, i.e., of defendant Doe; between defendants; among defendants; between defendant Doe and third party defendant Roe, etc.)* for assessment of the proportions of fault for plaintiff's damage assessed in Verdict ________,[1, 2, 3] we, the undersigned jurors, find:

Note: Complete by writing in the percentage of the relative fault for each party you believe to be at fault. [(If you believe a party named below is not at fault, write in "zero" for that percentage.)][4] [(You may not write in "zero" for) ________.][5] The total of the percentages you assess must not exceed 100%.

(Party whose fault may be apportioned)[6] is ________% at fault.

(Party whose fault may be apportioned)[6] is ________% at fault.

(Party whose fault may be apportioned)[6] is ________% at fault.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________

Notes on Use (1979 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. Insert the letter designation of the verdict which assesses damage for which fault is to be apportioned by this verdict.

3. In a separate trial of apportionment issues the verdict assessing damages for the prevailing party in the former trial will not be before the jury. For the phrase "plaintiff's damage assessed in Verdict ________," use [claimant's damage assessed in the prior trial].

4. This bracketed sentence must be used in submissions wherein three or more parties are the targets of claims for apportionment of fault for one claimant's damage to avoid the mistaken belief by the jury that it must assign a percentage of fault to a party who has been found not to be at fault for the claimant's damage.

5. Use this sentence only if it is determined under the substantive law that the jury must find a certain party to be partially at fault. If apportionment is being tried in a separate trial, insert in the blank the name of any party found in the prior trial to have been at fault. If apportionment and liability to plaintiff are being tried in the same trial, insert in the blank the words "any party you have determined to be at fault under the other instructions in this case."

6. The names of the party or parties whom the evidence shows may be found by the jury to have been at fault for the claimant's damage must be inserted in the form of verdict by the preparer of the form.

If a master's liability is submitted only upon the acts of his servant and both are defendants, insert both their names on the same line in accordance with the directions to the jury to assess only the servant's fault as the fault of both.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last form in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Regardless of how many claims for apportionment are pleaded between defendants (including third party defendants, etc.), only one verdict apportioning the fault for any one claimant's damage will be required.

Verdict forms should not be read by the Court to the jury.

Committee Comment (1996 Revision)

A. The requirement of Notes on Use No. 6, above, that the preparer of the form of verdict must insert the names of the party or parties against whom an apportionment of fault may be made, forestalls any attempt on the part of the jury to assign a part of the fault to the original plaintiff. This requirement is a deviation from the other forms in MAI which require the jury to write in the names of parties and is intended to be so.

B. A jury finding of "zero %" is a verdict in favor of that party on the issue of apportionment of fault.

C. This instruction, Notes on Use, and Committee Comment were originally promulgated as recommended by the Committee, but were neither approved nor disapproved by the Supreme Court. The Supreme Court, with the publication of the Fifth Edition of MAI, approved the approach to "apportionment of fault" contemplated by MAI 4.12, 4.13, 4.14 and verdict forms 36.15 and 36.16.

Research References

West's Key Number Digest
Negligence ⚷1750

Annotations

1. Pleadings

A third-party plaintiff seeking contribution from an alleged joint tortfeasor is not required to admit its fault to the plaintiff in its third-party petition. *Travelers Prop. Cas. Co. of Am. v. Manitowoc Co., Inc.*, 389 S.W.3d 174 (Mo.banc 2013).

36.16 [1979 New] Liability for Apportionment of Fault Against Party Not Claimed Against by Plaintiff

VERDICT ________[1]

Note: Complete this form by writing in the name(s) required by your verdict.

On the claim of [plaintiff] [third-party plaintiff] *(state the name)* seeking apportionment of fault against [defendant] [third-party defendant] *(state the name of one defendant)*, we, the undersigned jurors, find in favor of:

____

([Plaintiff] [Third-party Plaintiff] *(state the name)*) or ([Defendant] [Third-party Defendant] *(state the name of one defendant)*)

On the claim [plaintiff] [third-party plaintiff] *(state the name)* for apportionment of fault against [defendant] [third-party defendant] *(state the name of the other defendant)*, we, the undersigned jurors, find in favor of:

____

([Plaintiff] [Third-party Plaintiff] *(state the name)*) or ([Defendant] [Third-party Defendant] *(state the name of the other defendant)*)[2]

Note: All jurors who agree to the above must legibly sign or print their names below.

________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________
________________________ ________________________

Notes on Use (1996 Revision)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. Include the appropriate number of descriptive paragraphs and findings to allow the jury to find for or against each party not claimed against by plaintiff and against whom apportionment of fault is sought.

This verdict form allows the jury to determine the liability of any party not claimed against by plaintiff. MAI 36.15 Verdict-Apportionment of Fault must also be used to allow the jury to return the appropriate percentages of fault.

Verdict forms should not be read by the Court to the jury.

This instruction, Notes on Use, and Committee Comment were originally promulgated as recommended by the Committee, but were neither approved nor disapproved by the Supreme Court. The Supreme Court, with the publication of the Fifth Edition of MAI, approved the approach to "apportionment of fault" contemplated by MAI 4.12, 4.13, 4.14 and verdict forms 36.15 and 36.16.

Research References

West's Key Number Digest
Negligence 🔑1750

Annotations

1. Pleadings

A third-party plaintiff seeking contribution from an alleged joint tortfeasor is not required to admit its fault to the plaintiff in its third-party petition. *Travelers Prop. Cas. Co. of Am. v. Manitowoc Co., Inc.*, 389 S.W.3d 174 (Mo.banc 2013).

36.17 [2012 Withdrawn] Plaintiff vs. Defendant—Will Contest

Historical Note

(This verdict form and Notes on Use thereto are withdrawn. This verdict form has been replaced by MAI 15.10(A) relating to a will contest challenging a will in its entirety. See also MAI 15.10(B) relating to a challenge to only part of a will).

36.17(A) [2012 Withdrawn] Plaintiff vs. Defendant—Will Contest

Historical Note

(MAI 36.17(A) and its related Notes on Use have been withdrawn. All instructions and illustrations related to Will Contests have been collected in Chapter 15 of MAI—Civil. MAI 36.17(A) has been replaced by MAI 15.10(A) (2012 Revision)).

36.17(B) [2012 Withdrawn] Plaintiff vs. Defendant—Will Contest—Partial Invalidity

Historical Note

(MAI 36.17(B) and its related Notes on Use have been withdrawn All instructions and illustrations related to Will Contests have been collected in Chapter 15 of MAI—Civil. MAI 36.17(B) has been replaced by MAI 15.10(B) (2012 Revision)).

36.18 [1983 New] Commitment for Mental Illness

VERDICT ________[1]

Note: Complete this form by filling in the word or words required by your verdict.

We, the undersigned jurors, find:

That respondent ________ (here insert either "should" or "should not") be detained for treatment.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________

____________________ ____________________

____________________ ____________________

____________________ ____________________

____________________ ____________________

____________________ ____________________

Notes on Use (1983 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

Research References

West's Key Number Digest
Mental Health 🔑7

36.19 [1983 New] Plaintiff vs. Defendant—Disputed Partial Settlement

VERDICT ________[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) or (Defendant *(state the name)*)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff *(state the name)*.

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* at $________ (stating the amount) and further find that plaintiff previously has been paid $________ (stating the amount or, if none, write the word "none") on plaintiff's claim.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________

Notes on Use (1983 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be noninflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Verdict forms should not be read by the Court to the jury.

Verdict form MAI 36.19 is for use when the issue of a disputed partial settlement is submitted to the jury by MAI 7.02 and MAI 36.01 (Plaintiff vs. Defendant—Personal Injury Only) would otherwise be applicable. If a disputed settlement is submitted in a situation where another verdict form would otherwise be appropriate, modify MAI 36.19 by combining the language of MAI 36.19 concerning the jury's finding as to the settlement amount with the appropriate verdict form from Chapter 36.00.

Research References

West's Key Number Digest
Negligence ⚷1750

Annotations

In general 1

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1. In general

No prejudice resulted from omission of MAI 36.19 language in the verdict forms where jury obviously took into consideration the fact that plaintiffs had received a portion of their damages when they entered into prior settlement. *M.P. Industries, Inc. v. Axelrod*, 706 S.W.2d 589 (Mo.App. E.D. 1986).

36.20 [1988 New] Actions Against Health Care Providers—Plaintiff vs. Single Defendant—No Comparative Fault

VERDICT ________[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) OR (Defendant *(state the name)*)

Note: Complete the following only if the above finding is in favor of plaintiff *(state the name)*. Complete by writing in the amount of damages, if any, for each of the following itemized categories. If you do not find that plaintiff has damages in a particular category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have assessed.

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* as follows:

For past economic damages including past medical damages[3,4]	$________
For past non-economic damages[3,4]	$________
For future medical damages[3,4]	$________
For future economic damages excluding future medical damages[3,4]	$________
For future non-economic damages[3,4]	$________
TOTAL DAMAGES	$________

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________

Notes on Use (1988 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

3. Do not submit any category of damages that is not supported by the evidence.

4. The phrases describing the categories of damages must be defined. See definitions in MAI 21.05.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging."

Verdict forms should not be read by the Court to the jury.

Committee Comment (2012 Revision)

A. MAI 21.03 through MAI 21.07 and verdict forms 36.20 through 36.22 are applicable only to causes of action against health care providers accruing on or after February 3, 1986, and subject to the provisions of §§ 538.205 through 538.230, RSMo.

B. The provisions of H.B. 393 (Laws 2005) applicable to medical malpractice actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except on the subject of apportionment of fault to a settling tortfeasor under § 538.230, RSMo, (repealed by H.B. 393). The Committee takes no position on the constitutionality of any of the provisions of H.B. 393.

Research References

West's Key Number Digest
Negligence ⚷1720

Annotations

In general 1

1. In general

MAI 21.03 and 36.20, which require itemization of damages in actions against "health care" providers, did not apply to amputee's professional negligence suit against orthotics and prosthetics laboratory, which was not licensed by any governmental body. *Stalcup v. Orthotic & Prosthetic Lab, Inc.*, 989 S.W.2d 654 (Mo.App. E.D. 1999).

36.21 [1988 New] Actions Against Health Care Providers—Plaintiff vs. Multiple Defendants—No Apportionment of Fault Among Defendants and No Comparative Fault

VERDICT ________[1]

Note: Complete this form by writing in the name(s) required by your verdict.

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) OR (Defendant *(state the name)*)

On the claim of plaintiff *(state the name)* for personal injuries[2] against defendant *(state the name)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*) OR (Defendant *(state the name)*)

Note: Complete the following only if one or more of the above findings is in favor of plaintiff *(state the name)*.
Complete by writing in the amount of damages, if any, for each of the following itemized categories. If you do not find that plaintiff has damages in a particular category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have assessed.

We, the undersigned jurors, assess the damages of plaintiff *(state the name)* as follows:

For past economic damages including past medical damages[3,4] $________
For past non-economic damages[3,4] $________
For future medical damages[3,4] $________
For future economic damages excluding future medical damages[3,4] $________
For future non-economic damages[3,4] $________
TOTAL DAMAGES $________

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________
____________________ ____________________

Notes on Use (2012 Revision)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

3. Do not submit any category of damage that is not supported by the evidence.

4. The phrases describing the categories of damages must be defined. See definitions in MAI 21.05.

If fault is to be apportioned between two or more defendants in a case where no comparative fault is sought against the plaintiff, see Illustration 35.22 (and Committee Comment) which may be adapted for a case in which there are multiple defendants but no settling tortfeasor.

Caution: H.B. 393 repealed § 538.230 in 2005. Thus, for cases filed after August 28, 2005, there is no apportionment of fault to a settling tortfeasor in medical malpractice cases. Rather, a settlement with a health care provider will be handled under H.B. 393 in the same fashion as a settlement in any other case. See MAI 1.06, 7.02, 34.05 and 36.19.

Parenthetical directions "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging."

Verdict forms should not be read by the court to the jury.

Committee Comment (1988 New)

A. Under § 538.230.1, RSMo, there is no apportionment of fault among multiple defendants if all parties agree. If no defendant seeks apportionment, case law will determine whether the jury must nevertheless apportion fault among defendants.

B. MAI 21.03 through MAI 21.07 and verdict forms 36.20 through 36.22 are applicable only to causes of action against health care providers accruing on or after February 3, 1986, and subject to the provisions of §§ 538.205 through 538.230, RSMo.

C. The provisions of H.B. 393 (Laws 2005) applicable to medical malpractice actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except on the subject of apportionment of fault to a settling tortfeasor under § 538.230 (repealed by H.B. 393). The Committee takes no position on the constitutionality of any of the provisions of H.B. 393.

Research References

West's Key Number Digest
Negligence ⚿1720

Annotations

Modification 1

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1. Modification

Trial court did not err in submitting a modification of a MAI verdict form, in medical malpractice action, as MAI lacked verdict form that fit the case, which was action against health care providers involving plaintiff and multiple defendants with apportionment of fault among the defendants and no submission of comparative fault on the part of the plaintiff. *Pickel v. Gaskin*, 202 S.W.3d 630 (Mo.App. E.D. 2006).

36.22 [1988 New] Actions Against Health Care Providers—Plaintiff vs. Single or Multiple Defendants—Comparative Fault

VERDICT ________[1]

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff *(state the name)* for personal injury,[2] we, the undersigned jurors, assess percentages of fault as follows:

Defendant[3] *(state the name)*	________%	(zero to 100%)
Plaintiff *(state the name)*	________%	(zero to 100%)
TOTAL	________%	(zero OR 100%)

Note: Complete the following if you assessed a percentage of fault to (one or more) defendant(s). Complete by writing in the amount of damages, if any, for each of the following itemized categories. If you do not find that plaintiff has damages in a particular category, write "none" in that category. The total damages must equal the total of the itemized damages amounts you have assessed

We, the undersigned jurors, disregarding any fault on the part of plaintiff, find the total damages of plaintiff *(state the name)* as follows:

For past economic damages including past medical damages[4,5]	$________
For past non-economic damages[4,5]	$________

For future medical damages[4,5] $________

For future economic damages excluding future medical damages[4,5] $________

For future non-economic damages[4,5] $________

TOTAL DAMAGES $________

Note: The judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________________ ____________________________

____________________________ ____________________________

____________________________ ____________________________

____________________________ ____________________________

____________________________ ____________________________

____________________________ ____________________________

Notes on Use (2012 Revision)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase.

3. The names of those against whom fault may be assessed must be inserted in the verdict form by the preparer of the form.

Caution: § 538.230.1, RSMo, provides for apportionment among the parties and persons released from liability pursuant to § 538.230.3, RSMo. Mere insertion of the name of the released person and a space for assessment of fault to that person is not sufficient and would constitute a roving commission to the jury if unaccompanied by an appropriate verdict directing instruction applicable to that released person. The burden of proof and the responsibility to tender such a verdict director is on the party seeking an assessment of a percentage of fault to a released person. See Illustration 35.21 (and Committee Comment) which may be adapted for a case in which there are multiple defendants but no settling tortfeasor.

Caution: HB 393 repealed § 538.230 in 2005. Thus, for cases filed after August 2005, there is no apportionment of fault to a settling tortfeasor in medical malpractice cases. Rather, a settlement with a health care provider will be handled under H.B. 393 in the same fashion as a settlement in any other case. See, MAI 1.06, 7.02, 34.05, and 36.19.

4. Do not submit any category of damage that is not supported by the evidence.

5. The phrases describing the categories of damages must be defined. See definitions in MAI 21.05.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Verdict forms should not be read by the court to the jury.

Committee Comment (2012 Revision)

A. MAI 21.03 through MAI 21.07 and verdict forms 36.20 through 36.22 are applicable only to causes of action against health care providers accruing on or after February 3, 1986, and subject to the provisions of §§ 538.205 through 538.230, RSMo.

B. The provisions of H.B. 393 (Laws 2005) applicable to medical malpractice actions filed after August 28, 2005, do not appear to impact jury instructions in the view of the Committee except on the subject of apportionment of fault to a settling tortfeasor under § 538.230 (repealed by H.B. 393). The Committee takes no position on the constitutionality of any of the provisions of H.B. 393.

Research References

West's Key Number Digest
Negligence ⚷1720

Annotations

Modification 1

1. Modification

Trial court did not err in submitting a modified MAI verdict form, in medical malpractice action, as MAI lacked verdict form that fit the case, which was action against health care providers involving plaintiff and multiple defendants with apportionment of fault among defendants and no submission of comparative fault. *Pickel v. Gaskin*, 202 S.W.3d 630 (Mo.App. E.D. 2006).

36.23 [1991 New] Combined Injury and Derivative Claims

VERDICT ________[1]

Note: Complete this form by writing in the name(s) required by your verdict.

On the claim of plaintiff *(state name of plaintiff with primary claim)* for personal injuries against defendant *(state the name)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state name of with primary claim)*) or (Defendant *(state the plaintiff name)*)

Note: Complete the following paragraphs only if [one or more of][2] the above finding(s) is in favor of plaintiff *(state name of plaintiff with primary claim)*.

We, the undersigned jurors, assess the damages of plaintiff *(state name of plaintiff with primary claim)* for personal injuries at $________ *(stating the amount)*.

Note: Complete the following paragraph by writing in the word(s) required by your verdict.

On the claim of plaintiff *(state name of plaintiff with derivative claim)* for damages due to injury to [his] [her] [husband] [wife] [child],[3] we, the undersigned jurors, find that plaintiff *(state name of plaintiff with derivative claim)* ____________ sustain damage as a direct result of injury to
(“did” or “did not”)
[his] [her] [husband] [wife] [child].[3]

Note: Complete the following paragraph only if the above finding is that plaintiff *(state name of plaintiff with derivative claim)* "did" sustain such damage.

We, the undersigned jurors, assess the damages of plaintiff *(state name of plaintiff with derivative claim)* due to injury to [his] [her] [husband] [wife] [child][3] at $________ *(stating the amount).*

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________

Notes on Use (2017 Revision)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. Insert if more than one defendant.

3. Select the appropriate word(s).

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Verdict forms should not be read by the court to the jury.

4. Of course, if the verdict is in favor of the defendant and against the plaintiff on the primary claim, by operation of law, judgment must be entered in favor of the defendant on the derivative claim.

Research References

West's Key Number Digest
Negligence ⚷1750

36.24 [1995 Revision] Actions Against Health Care Providers—Lost Chance of Survival—No Comparative Fault

VERDICT ________[1]

NOTE: Complete this form as required by your verdict.

On the claim of plaintiff *(state the name of plaintiff ad litem or personal representative)*, for lost chance of [survival] [recovery][2] against defendant *(state the name)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*)	OR	(Defendant *(state the name)*)

NOTE: Complete the following only if the above finding is in favor of plaintiff *(state the name)*. Complete by writing in the amount, if any, for each of the following itemized categories of damages. If you do not find damages in a particular damage category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have determined.

We, the undersigned jurors, find the total damages as follows:

For past economic damages[3, 4] including past medical damages	$________
For past non-economic damages[3, 4]	$________
For future economic damages[3, 4]	$________
For future non-economic damages[3, 4]	$________
TOTAL DAMAGES	$________

We, the undersigned jurors, find that the chance of [survival] [recovery]^2 *(state the name of decedent)* lost was ________%.

NOTE: The judge will compute the final award by multiplying the total amount you determine as damages by the percentage you find as the lost chance of [survival] [recovery]^2.

NOTE: All jurors who agree to the above must legibly sign or print their names below.

______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________
______________________________ ______________________________

Notes on Use (1993 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be noninflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase. Select a term.

3. Do not submit any category of damages that is not supported by the evidence.

4. The phrases describing the categories of damages must be defined. See definitions in MAI 21.05.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging."

Verdict forms should not be read by the court to the jury.

Committee Comment (1995 Revision)

A. This verdict form applies to the cause of action for "lost chance of recovery (survival)" established in *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo.banc 1992). *Wollen* discussed the "lost chance of recovery" theory in the context of a survival action under § 537.020, RSMo, brought by a personal representative of an individual who died after losing a material chance of recovery from cancer.

B. Since this verdict form was drafted by the Committee for use in a "loss of a chance" case in which the patient died, the category of "future medical damages" has been deleted from the categories of itemized damages. Insertion of that category may be appropriate in a "lost chance" case based on "loss of a limb" discussed in *Wollen*.

C. *See* Committee Comment to MAI 21.08.

Research References

West's Key Number Digest
Negligence ⚷1720

36.25 [1995 Revision] Actions Against Health Care Providers—Lost Chance of Survival—Comparative Fault

VERDICT ________[1]

NOTE: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%; otherwise, write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff *(state the name of plaintiff ad litem or personal representative)* for lost chance of [survival] [recovery][2], we, the undersigned jurors, assess percentages of fault as follows:

Defendant[3] *(state the name)*	________% (zero to 100%)
(State name of Decedent)	________% (zero to 100%)
TOTAL	________% (zero *OR* 100%)

NOTE: Complete the following if you assessed a percentage of fault to (one or more) defendant(s). Complete by writing in the amount, if any, for each of the following itemized categories of damages. If you do not find damages in a particular category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have determined.

We, the undersigned jurors, disregarding any fault on the part of *(state name of decedent)*, find the total damages as follows:

For past economic damages[4, 5] including past medical damages $________

For past non-economic damages[4, 5]	$________
For future economic damages[4, 5]	$________
For future non-economic damages[4, 5]	$________
TOTAL DAMAGES	$________

We, the undersigned jurors, find that the chance of [recovery] [survival][2] *(state the name of decedent)* lost was ________%.

NOTE: The judge will compute the final award by multiplying the amount you determine as total damages by the percentage you find as the lost chance of [recovery] [survival][2] and making a reduction by any percentage of fault you assess to *(state name of decedent).*

NOTE: All jurors who agree to the above must legibly sign or print their names below.

________________________ ________________________
________________________ ________________________
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________________________ ________________________

Notes on Use (2012 Revision)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase. Select a term.

3. The names of those against whom fault may be assessed must be inserted in the verdict form by the preparer of the form.

Caution: § 538.230.1, RSMo, provides for apportionment among the parties and persons released from liability pursuant to § 538.230.3, RSMo. Mere insertion of the name of the released person and a space for assessment of fault to that person is not sufficient and would constitute a roving commission to the jury if unaccompanied by an appropriate verdict directing instruction applicable to that released person. The burden of proof and the responsibility to tender such a verdict director is on the party seeking an assessment of a percentage of fault to a released person. See Illustration 35.21 (and Committee Comment) which may be adapted for a case in which there are multiple defendants but no settling tortfeasor.

Caution: H.B. 393 repealed § 538.230 in 2005. Thus, for cases filed after August 28, 2005, there is no apportionment of fault to a settling tortfeasor in medical malpractice cases. Rather, a settlement with a health care Provider will be handled under H.B. 393 in the same fashion as a settlement in any other case. *See*, MAI 1.06, 7.02, 34.05, and 36.19.

4. Do not submit any category of damage that is not supported by the evidence.

5. The phrases describing the categories of damages must be defined. See definitions in MAI 21.05.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Verdict forms should not be read by the court to the jury.

Committee Comment (1995 Revision)

A. This verdict form applies to the cause of action for "lost chance of recovery (survival)" established in *Wollen v. DePaul Health Center*, 828 S.W.2d 681 (Mo.banc 1992). *Wollen* discussed the "lost chance of recovery" theory in the context of a survival action under § 537.020, RSMo, brought by a personal representative of an individual who died after losing a material chance of recovery from cancer.

B. Since this verdict form was drafted by the Committee for use in a "loss of a chance" case in which the patient died, the category of "future medical damages" has been deleted from the categories of itemized damages. Insertion of that category may be appropriate in a "lost chance" case based on "loss of a limb" discussed in *Wollen*.

C. *See* Committee Comment to MAI 21.08.

Research References

West's Key Number Digest
Negligence ⚷1720

36.26 [1994 New] Actions Against Health Care Providers—Lost Chance of Recovery (Non-Death) Cases—No Comparative Fault

VERDICT ________[1]

NOTE: Complete this form as required by your verdict.

On the claim of plaintiff *(state the name)*, for lost chance of [survival] [recovery][2] against defendant *(state the name)*, we, the undersigned jurors, find in favor of:

____

(Plaintiff *(state the name)*)	OR	(Defendant *(state the name)*)

NOTE: Complete the following only if the above finding is in favor of plaintiff *(state the name)*. Complete by writing in the amount, if any, for each of the following itemized categories of damages. If you do not find damages in a particular damage category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have determined.

We, the undersigned jurors, find the total damages as follows:

For past economic damages[3, 4] including past medical damages	$________
For past non-economic damages[3, 4]	$________
For future medical damages[3, 4]	$________
For future economic damages excluding future medical damages[3, 4]	$________
For future non-economic damages excluding future medical damages[3, 4]	$________
TOTAL DAMAGES	$________

We, the undersigned jurors, find that the chance of [survival] [recovery][2] *(state name of plaintiff)* lost was ________*%.*

NOTE: The judge will compute the final award by multiplying the total amount you determine as damages by the percentage you find as the lost chance of [survival] [recovery][2].

NOTE: All jurors who agree to the above must legibly sign or print their names below.

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Notes on Use (1994 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be noninflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase. Select a term.

3. Do not submit any category of damages that is not supported by the evidence.

4. The phrases describing the categories of damages must be defined. See definitions in MAI 21.05.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging."

Verdict forms should not be read by the court to the jury.

Research References

West's Key Number Digest
Negligence ⚷1720

36.27 [1994 New] Actions Against Health Care Providers—Lost Chance of Recovery (Non-Death) Cases—Comparative Fault

VERDICT ________[1]

NOTE: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%; otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff *(state the name)*, for lost chance of [survival] [recovery][2], we, the undersigned jurors, assess percentages of fault as follows:

Defendant[3] *(state the name)*	________% (zero to 100%)
Plaintiff *(state the name)*	________% (zero to 100%)
TOTAL	________% (zero *OR* 100%)

NOTE: Complete the following if you assessed a percentage of fault to (one or more) defendant(s). Complete by writing in the amount, if any, for each of the following itemized categories of damages. If you do not find damages in a particular category, write "none" in that category. The total damages must equal the total of the itemized damage amounts you have determined.

We, the undersigned jurors, disregarding any fault on the part of *(state name of plaintiff)*, find the total damages as follows:

For past economic damages[4, 5] including past medical damages	$________

For past non-economic damages[4, 5]	$________
For future medical damages[4, 5]	$________
For future economic damages excluding future medical damages[4, 5]	$________
For future non-economic damages[4, 5]	$________
TOTAL DAMAGES	$________

We, the undersigned jurors, find that the chance of [recovery] [survival][2] *(state name of plaintiff)* lost was ________%.

NOTE: The judge will compute the final award by multiplying the amount you determine as total damages by the percentage you find as the lost chance of [recovery] [survival][2] and making a reduction by any percentage of fault you assess to *(state name of plaintiff)*.

NOTE: All jurors who agree to the above must legibly sign or print their names below.

____________________ ____________________
____________________ ____________________
____________________ ____________________
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Notes on Use (2012 Revision)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment for a discussion and for examples of the appropriate identifying phrase. Select a term.

3. The names of those against whom fault may be assessed must be inserted in the verdict form by the preparer of the form.

Caution: § 538.230.1, RSMo, provides for apportionment among the parties and persons released from liability pursuant to § 538.230.3, RSMo. Mere insertion of the name of the released person and a space for assessment of fault to that person is not sufficient and would constitute a roving commission to the jury if unaccompanied by an appropriate verdict directing instruction applicable to that released person. The burden of proof and the responsibility to tender such a verdict director is on the party seeking an assessment of a percentage of fault to a released person. See Illustration 35.21 (and Committee Comment) which may be adapted for a case in which there are multiple defendants but no settling tortfeasor.

Caution: HB 393 repealed § 538.230 in 2005. Thus, for cases filed after August 28, 2005, there is no apportionment of fault to a settling tortfeasor in medical malpractice cases. Rather, a settlement with a health care provider will be handled under H.B. 393 in the same fashion as a settlement in any other case. See MAI 1.06, 7.02, 34.05, and 36.19.

4. Do not submit any category of damage that is not supported by the evidence.

5. The phrases describing the categories of damages must be defined. See definitions in MAI 21.05.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Verdict forms should not be read by the court to the jury.

Research References

West's Key Number Digest
Negligence ⚷1720

36.28 [1994 New] Paternity Actions

VERDICT

NOTE: Complete this form by writing in the word(s) required by your verdict.

We, the undersigned jurors, ________ ("do" or "do not") find that *(state the name of the putative father)* is the natural father of *(state the name of the child).*

NOTE: All jurors who agree to the above must legibly sign or print their names below.

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____________________ ____________________
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____________________ ____________________

Committee Comment (1998 Revision)

A. *See* Committee Comment to MAI 31.18.

B. MAI 3.08, MAI 31.18, MAI 31.19, MAI 31.20, and MAI 36.28 were drafted for civil paternity actions under §§ 210.817 *et seq.*, RSMo. Effective July 1, 1997, § 210.839.4, RSMo, was amended to provide that no party in such a paternity action has a right to trial by jury. The Committee has chosen not to withdraw these instructions and the related verdict form in the event that they are instructive or perhaps useful in the future since the Missouri Supreme Court has held that the Parentage Act (§§ 210.817 *et seq.*) is not the exclusive means to determine paternity. *Matter of Nocita*, 914 S.W.2d 358 (Mo.banc 1996).

Research References

West's Key Number Digest
Parent and Child ⚷205(1), 205(2), 229

37.00

COMPARATIVE FAULT

37.00 Comparative Fault—General Comment
37.01 Verdict Directing Modification
37.02 Required Change of Former Contributory Negligence Instruction to Submit Plaintiff's Comparative Fault
37.03 Damages
37.04 Converse Instructions—Plaintiff or Defendant
37.05(1) Vicarious Liability—Agency in Issue
37.05(2) Vicarious Liability—Agency Not Disputed
37.06 Complete Affirmative Defenses
37.07 Form of Verdict—Plaintiff vs. Defendant
37.08 Damages—Personal Injury and Loss of Consortium, Loss of Services or Medical Expenses—Spouse or Child Injured
37.09 Form of Verdict—Combined Injury and Derivative Claims

Research References

West's Key Number Digest
Negligence 🔑1746

A.L.R. Library
A.L.R. Index, Comparative Negligence; Vicarious Liability
West's A.L.R. Digest, Negligence 🔑1746

37.00 [2018 New] Comparative Fault—General Comment

A. Missouri has adopted pure comparative fault as set forth in the Uniform Comparative Fault Act, 12 U.L.A. 135 (1996), "insofar as possible." *Gustafson v. Benda*, 661 S.W.2d 11 (Mo.banc 1983). The Uniform Comparable Fault Act may be a bit difficult to locate, but it is attached as an Appendix to the *Gustafson* decision. A thorough analysis of comparative fault is not possible within the limitations of this General Comment. However, a few observations on the interrelationship of comparative fault with instructional issues are appropriate.

B. The adoption of pure comparative fault in Missouri does *not* mean that comparative fault will be submitted in all cases. The doctrine does not eliminate or reduce the defendant's burden of pleading and proving a prima facie case of fault on the part of the plaintiff. The doctrine only eliminates that aspect of contributory negligence that would operate to bar a plaintiff's recovery. Rather, such negligence on the part of the plaintiff, if supported by law and fact, translates that conduct into a reduction of plaintiff's recovery in proportion to the percentage of fault assessed to plaintiff.

C. An instruction submitting comparative fault of the plaintiff must be supported by substantial evidence, and by the law, or it will be erroneous. *Herrington v. Medevac Med. Response*, 438 S.W.3d 417 (Mo.App. W.D. 2014); *Roy v. Mo. Pac. R.R. Co.*, 43 S.W.3d 351 (Mo.App. W.D. 2001); *Brown v. Shawneetown Feed & Seed Co.*, 730 S.W.2d 587 (Mo.App. E.D. 1987).

D. In a premises case, there must also be evidence that the plaintiff had actual (or constructive) knowledge and appreciation of the danger actually encountered, that the plaintiff could have seen the danger, and that the plaintiff could have taken precautionary action to avoid the danger. *Rider v. YMCA of Greater Kansas City*, 460 S.W.3d 378 (Mo.App. W.D. 2015); *Brown, supra*; *Burns v. Schnuck Mkts., Inc.*, 719 S.W.2d 499 (Mo.App. E.D. 1986).

E. Under some circumstances, the doctrine of assumption of the risk (implied primary assumption of the risk) is a question of law for the court. On the other hand, "implied secondary assumption of the risk" would ordinarily be submitted as a "failure to keep a careful lookout." See *Coomer v. Kansas City Royals Baseball Corp.*, 437 S.W.3d 184 (Mo.banc 2014).

F. If there is evidence from which a jury could conclude that a plaintiff's negligence was legally sufficient, and a contributing cause to the plaintiff's own damages, the case may be submitted to the jury under approved comparative fault instructions in the format provided in Chapter 37. A comparative fault instruction must be tendered by either the defendant, or the plaintiff, if the case is to be submitted under comparative fault. However, the submission of comparative fault is not the exclusive province of the defendant. See *Smith v. Brown & Williamson Tobacco Corp.*, 275 S.W.3d 748, 810 (Mo.App. W.D. 2008); *Thompson v. Brown & Williamson Tobacco Corp.*, 207 S.W.3d 76 (Mo.App. W.D. 2006). In the *Brown & Williamson Tobacco Corp.* cases, the court noted that allowing a defendant to withdraw consideration of comparative fault after introduction of evidence of the plaintiff's fault would negate the concept of comparative fault and effectively reinstate the concept of contributory negligence as an absolute bar to recovery.

G. If neither side tenders a comparative fault instruction, the case may be submitted on the basis of the existence or nonexistence of defendant's fault. *Henderson v. Terminal R.R. Ass'n of St. Louis*, 736 S.W.2d 594 (Mo.App. E.D. 1987); *Earll v. Consol. Aluminum Corp.*, 714 S.W.2d 932 (Mo.App. E.D. 1986).

H. Comparative fault has been applied legislatively to the doctrine of strict liability in tort for a product defect. See § 537.765, RSMo; *Egelhoff v. Holt*, 875 S.W.2d 543, 547 (Mo.banc 1994). Any instruction that simply quotes statutory language from § 537.765 for a submission of comparative fault may be erroneous as not complying with Rule 70.02(b)requirements that all instructions are to be simple, brief, impartial, and neither submit, nor require findings of, detailed evidentiary matters. The subparagraphs of

§ 537.765 are necessarily general and do not specify any act of the plaintiff on which to base a finding of comparative negligence and may implicate judicial prohibitions against roving commissions.

I. Comparative fault has also been applied to other forms of statutory strict liability. See *Coble v. Taylor*, 480 S.W.3d 467 (Mo.App. S.D. 2016) (strict liability claim under the Animal Enclosure Act, § 272.030, RSMo).

J. In a case involving multiple defendants, the defendants are permitted only one, jointly submitted comparative fault instruction related to the plaintiff's fault; it would be error to give two or more. *Egelhoff*, 875 S.W.2d 543; *Cornell v. Texaco, Inc.*, 712 S.W.2d 680 (Mo.banc 1986). It is important to note that a defendant may rely on multiple submissions of plaintiff's fault — submitted in the alternative in a single instruction — even though inconsistent. *Michael v. Kowalski*, 813 S.W.2d 6 (Mo.App. W.D. 1991).

K. The doctrine of comparative fault is concerned only with the *relative fault among the parties*. It does not contemplate an inquiry into all causative agents for an injury. Therefore, the 100% figure determined by the jury is related only to the combined fault of the parties. There may be other causative agents — e.g., immune parties, settling tortfeasors, persons not joined, etc. — that may be considered to be partly at fault, but these are not part of the determination of all or any part of the fault assessed by the jury. *Freight House Lofts Ass'n v. VSI Meter Servs.*, 402 S.W.3d 586 (Mo.App. W.D. 2013). The Comment to § 2 of the Uniform Comparative Fault Act, 12 ULA 135, 136 (1996), requires that the conduct or fault of non-parties be *ignored*. Thus, the verdict form should not contain a space for the assessment of fault to a nonparty or settling tortfeasor. *Fahy v. Dresser Indus., Inc.*, 740 S.W.2d 635 (Mo.banc 1987). Likewise, a verdict form may not allow an assessment of a percentage of fault to a party on an unpleaded theory. *Bradley v. Waste Mgmt. of Mo., Inc.*, 810 S.W.2d 525 (Mo.App. E.D. 1991).

L. Under *Gustafson*, the doctrine of joint and several liability was not affected by the adoption of pure comparative fault as contained in the Uniform Comparative Fault Act. However, in 2005, the Missouri legislature revised § 537.067, RSMo, and changed responsibility for damage awards depending on the parties' percentages of fault. That revised statute now provides that any party found to be less than 51% responsible is only liable for that percentage of a damage award. Any party responsible for 51% fault or more can be made to pay the entire amount of an award. § 537.067.1.

M. When a case involves a primary injury to one spouse, and a consortium claim on behalf of the other spouse, the same percentage of fault assessed to the primary claim also applies to the consortium claim. See *Johnson v. Hyster Co.*, 777 S.W.2d 281 (Mo.App. W.D. 1989); MAI (Civil) 37.08 and 37.09.

N. General principles applicable to verdict-directing instructions also apply to comparative fault cases. A party has a right to try or defend a case based on that party's own theory as long as the verdict-directing instruction submitting that party's theories is supported by the law, the evidence, and in proper form. *Mitchell v. Evans*, 284 S.W.3d 591 (Mo.App. W.D. 2008); *Coleman v. Meritt*, 292 S.W.3d 339 (Mo.App. S.D. 2009). Neither an opposing party, nor the trial court itself, has the right to interfere with a party's selection of an appropriate submission of recovery or defense.

O. As a general proposition, the appellate courts may remand for new trial on all issues because of an erroneous comparative fault instruction — the issues of fault and damages are generally considered to be blended and interwoven. *Secrist v. Treadstone, LLC*, 356 S.W.3d 276 (Mo.App. W.D. 2011); *Talley v. Swift Transp. Co.*, 320 S.W.3d 752 (Mo.App. W.D. 2010).

P. The Supreme Court of Missouri also held that the doctrine of pure comparative fault applied to a claim of purely economic loss. *Children's Wish Found. Int'l, Inc. v. Mayer Hoffman McCann, P.C.*, 331 S.W.3d 648 (Mo.banc 2011).

Research References

West's Key Number Digest
Negligence ⚷1746

37.01 [1986 New] Verdict Directing Modification

In a verdict directing instruction directing an assessment of fault in a comparative fault case, the initial phrase of plaintiff's verdict director should be modified as follows:

> In your verdict, you must assess a percentage of fault to defendant [whether or not plaintiff was partly at fault][1], if you believe:

For verdict directing modification in such an action involving multiple defendants, use the following initial phrase for plaintiff's verdict directors:

> In your verdict, you must assess a percentage of fault to defendant *(state the name)* [whether or not plaintiff was partly at fault][1] if you believe:

The remaining paragraphs of the verdict directing instruction would be derived from a verdict directing instruction where comparative fault is not submitted. Thus, if verdict directing instruction 17.01 were to be modified for a comparative fault case, it would read as follows:

> In your verdict, you must assess a percentage of fault to defendant [whether or not plaintiff was partly at fault][1] if you believe:

First, defendant violated the traffic signal, and

Second, defendant was thereby negligent,[2] and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.[3]

* [unless you believe you must not assess a percentage of fault to defendant by reason of Instruction Number ________ *(here insert number of complete affirmative defense instruction)*].

Notes on Use (2012 Revision)

1. The bracketed phrase may be used at plaintiff's option.

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

3. Paragraph Third of MAI 17.01 is shown here modified in accordance with the first alternate of MAI 19.01.

Gustafson v. Benda, 661 S.W.2d 11 (Mo.banc 1983) adopted pure comparative fault. In any case in which comparative fault is submitted, all verdict directing instructions should be modified with MAI 19.01. Since instructions submitting plaintiff's comparative fault in Chapter 21, and MAI 37.02 already use the language "directly caused or directly contributed to cause", it would be inconsistent not to use the MAI 19.01 verdict directing modification in plaintiff's verdict directing instruction against defendant in a comparative fault case.

* Add only if complete affirmative defense is submitted. This bracketed material should not be used to submit comparative fault.

Committee Comment (1986 New)

A. This modification of traditional verdict directing instructions is for use in submitting comparative fault as adopted in *Gustafson v. Benda*, 661 S.W.2d 11 (Mo.banc 1983). The optional bracketed phrase in the opening sentence is intended to alleviate any doubt the jury may have about returning a verdict for plaintiff in a situation where plaintiff is partly at fault. For submission of a true affirmative defense in a comparative fault case, see MAI 37.06.

Research References

West's Key Number Digest
Negligence ⚷1746

Annotations

In general 1
Rescue doctrine 2

1. In general

In a suit by an invitee against a business for injuries sustained in a fall on the business premises, court erred in submitting verdict-directing instruction based on MAI 22.03, in that the second paragraph of the instruction submits issue of plaintiff's ordinary care in discovering an unsafe condition and thus is inimical to the concept of comparative fault. *Cox v. J.C. Penney Co.*, 741 S.W.2d 28 (Mo.banc 1987).

Comparative fault does not apply in a strict products liability case, but the giving of MAI 32.23 is not precluded in the appropriate case. *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo.banc 1986). But now see §§ 537.765 *et seq.*, RSMo.

Even if ski resort's comparative fault instruction was erroneous in minor skier's personal injury action, by stating skier could have been at fault if he left place of safety and moved into path of chair lift, instruction did not prejudice skier, since jury assessed no fault against resort. *Ludwick ex rel. Ludwick v. Snow Creek, Inc.*, 37 S.W.3d 418 (Mo.App. W.D. 2001).

Parties impliedly tried case under comparative fault principles, so that comparative fault instructions were properly given, where defendant initially introduced issue of comparative fault in its opening statement and reminded jurors in closing argument of plaintiff's actions, both parties elicited testimony from plaintiff about whether she was looking where she was going and whether she was paying attention, and such evidence constituted integral part of causation issue and was not relevant to other issues in case. *Rudin v. Parkway School Dist.*, 30 S.W.3d 838 (Mo.App. E.D. 2000).

Failure of trial court to modify phrase "as a direct result" in damage instruction, to conform to phrase "directly caused or directly contributed to cause" in verdict directing instruction, engendered confusion for jury and prejudiced plaintiff, entitling her to new trial on issue of damages in personal injury action arising from motor vehicle accident; evidence was presented that plaintiff experienced multiple possible causes for injuries to her body, i.e., automobile accident and prior and subsequent work-related injuries, and jury may have been confused as to how to award damages. *Snelling v. Gress*, 996 S.W.2d 538 (Mo.App. W.D. 1999).

Any error in instructing the jury on plaintiff's comparative fault is harmless error if 100% of the fault is attributed to the complaining party. *Inman v. Bi-State Development Agency*, 849 S.W.2d 681 (Mo.App. E.D. 1993).

In suit by pedestrian to recover for injuries sustained as a result of being struck by motorist, trial court correctly instructed jury to determine the respective negligence of the pedestrian and the motorist and assess percentages of fault. Even if comparative fault instruction had been erroneous, pedestrian suffered no prejudice where jury found pedestrian 100% at fault for being struck by motorist. *Biever v. Williams*, 755 S.W.2d 291, 294 (Mo.App. W.D. 1988).

In a negligence case, where there is evidence from which a jury could find that plaintiff's conduct was a contributing cause of his damages, unless the parties agree otherwise, the case should be submitted to the jury under the instructions and verdict forms approved for use in comparative fault cases regardless of whether the defendant submits an affirmative defense instruction or not. *Earll v. Consolidated Aluminum Corp.*, 714 S.W.2d 932 (Mo.App. E.D. 1986).

Plaintiff cannot embrace the comparative fault doctrine in his verdict director and then repudiate it on appeal. *Dodson By and Through Dodson v. Robertson*, 710 S.W.2d 292 (Mo.App. S.D. 1986).

2. Rescue doctrine

In wrongful death action, comparative fault instruction submitted to the jury was erroneous, because it failed to differentiate the standards of care required in creating peril and in attempting rescue, and did not instruct jury that it could not assess comparative fault against rescuer-decedent unless his conduct in attempting rescue was rash or reckless. *Allison v. Sverdrup & Parcel and Assoc., Inc.*, 738 S.W.2d 440 (Mo.App. E.D. 1987).

37.02 [1986 New] Required Change of Former Contributory Negligence Instruction to Submit Plaintiff's Comparative Fault

In an instruction in a comparative fault case submitting fault on the part of plaintiff, the initial phrase of a defendant's instruction submitting fault on the part of plaintiff should be:

> In your verdict, you must assess a percentage of fault to plaintiff [whether or not defendant was partly at fault][1] if you believe:

The remaining paragraphs of defendant's instruction would be similar to the essential elements of those types of verdict directing instructions formerly used to submit contributory negligence as a complete defense. Thus, if partial fault of plaintiff is submitted to the jury based upon MAI 32.01(1), it would read as follows:

> In your verdict, you must assess a percentage of fault to plaintiff [, whether or not defendant was partly at fault,][1] if you believe:
>
> First, plaintiff drove at an excessive speed, and
>
> Second, plaintiff was thereby negligent,[2] and
>
> Third, such negligence[2] of plaintiff directly caused or directly contributed to cause any damage plaintiff may have sustained.

Notes on Use (1986 New)

1. The bracketed phrase may be used at defendant's option.

2. The terms "negligent" and "negligence" must be defined. See definitions in Chapter 11.00.

Committee Comment (1996 New)

A. This sample instruction submits a single act of negligence. If more than one act is submitted in the disjunctive, see MAI 32.01(2). For other instructions on specifications of negligence which may be used in comparative fault submissions, see Chapter 17.00 and Chapter 32.00 to the extent allowed by substantive law.

B. In *Egelhoff v. Holt*, 875 S.W.2d 543 (Mo.banc 1994), the Supreme Court held that under the Missouri pure comparative fault system, plaintiff's negligence is not compared with that of defendant A and then again with defendant B. Rather, it is compared with the cumulative fault of all defendants. Thus, under *Egelhoff*, only a single comparative fault instruction may be given against plaintiff where there are multiple defendants, even if the liability of those defendants is premised upon multiple theories (*e.g.* strict liability and negligence).

Research References

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Annotations

In general 1
Humanitarian doctrine 3
Multiple defendants 2

1. In general

There is no requirement that plaintiff have actual knowledge of alleged defect in order to submit comparative fault of plaintiff in product liability case. *Egelhoff v. Holt*, 875 S.W.2d 543 (Mo.banc 1994).

Evidence supported giving of instructions on comparative negligence of victim in automobile accident wrongful death case where there was evidence that victim had observed accident, left his car and walked across highway, going over median wall, and was standing in fast traffic lane when struck. *Oldaker v. Peters*, 817 S.W.2d 245 (Mo.banc 1991).

Comparative fault does not apply in a strict products liability case, but the giving of MAI 32.23 is not precluded in the appropriate case. *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo.banc 1986). See §§ 537.765 *et seq.*, RSMo.

Trial court did not abuse its discretion by refusing to submit comparative fault instruction in personal injury action brought by haybine operator against bus company after collision occurred between bus and haybine; bus driver stated it was possible he could have avoided collision with haybine if he had kept his eyes on the road and not turned around to speak to passengers, bus driver stated that operator could not have done anything to avoid the collision, and no authority indicated that farm implements may not be operated on a highway when it was necessary to travel short distances. *Ruzicka v. Ryder Student Transp. Services, Inc.*, 145 S.W.3d 1 (Mo.App. S.D. 2004).

Comparative fault instruction may be given in products liability case if there is sufficient evidence that plaintiff knowingly exposed himself to known danger. *Watkins v. Toro Co.*, 901 S.W.2d 917 (Mo.App. E.D. 1995).

Evidence in products liability action to recover for injuries sustained by user while operating commercial lawnmower did not warrant comparative fault instruction; user was injured when he slipped on loose grass clippings and his foot slid under mower, and he testified that he did not voluntarily put his foot into area of blade and that he did not knowingly or voluntarily put his foot where blade was rotating; moreover, there was no evidence that user misused mower. *Watkins v. Toro Co.*, 901 S.W.2d 917 (Mo.App. E.D. 1995).

Alleged error in product liability case that comparative fault instruction deviated from pattern instruction was harmless where jury determined that defendant was 0% at fault. *Morrison v. Kubota Tractor Corp.*, 891 S.W.2d 422 (Mo.App. W.D. 1994).

In strict liability action for design defect of log splitter, evidence of plaintiff's voluntary exposure to known danger by reaching for log which was falling from log splitter, at which point his fingers were severed, supported submission of comparative fault instruction. *Wilson v. Danuser Mach. Co., Inc.*, 874 S.W.2d 507 (Mo.App. S.D. 1994).

Any error in giving comparative fault instruction in personal injury action which was not supported by the evidence and which omitted word "and" between first and second paragraphs, thereby deviating from MAI, was harmless, where 10 to 12 jurors assessed zero percent of fault to defendant and 100% of fault to plaintiff. *Johnston v. Conger*, 854 S.W.2d 480 (Mo.App. W.D. 1993).

Comparative fault instruction in negligence suit by motorist injured in rear-end collision was supported by evidence that motorist stopped vehicle on highway to allow oncoming truck to pass through bridge, bridge was as wide as paved portion of highway, motorist did not pull off onto shoulder of road, did not engage emergency flashing lights, and road conditions were dark and wet. *Tennison v. State Farm Mut. Auto Ins. Co.*, 834 S.W.2d 846 (Mo.App. W.D. 1992).

Principle of comparative fault in failure of patient to follow physician instructions should also apply to failure to follow hospital nurse's instructions; however, hospital's requested instruction concerning patient's failure to turn over to allow nurse to check his condition and to check a heating pad was properly refused in action involving burns from the heating pad where hospital offered no evidence that patient could turn and it was not shown whether patient had already been burned by the heating pad by the time of the nurse's request. *Hackathorn v. Lester E. Cox Medical Center*, 824 S.W.2d 472 (Mo.App. S.D. 1992).

In product liability case on behalf of injured worker due to alleged defect in press assembly, allegedly erroneous comparative fault instruction was held not to be prejudicial where the jury assessed zero percent fault to the manufacturer and zero percent fault to the plaintiff. *Schaedler v. Rockwell Graphic Systems, Inc.*, 817 S.W.2d 499 (Mo.App. W.D. 1991).

Conceded or undisputed conduct on the part of the plaintiff may be submitted as comparative fault. Court holds that comparative fault instruction in this case is not required to submit a hypothecation of actual or constructive knowledge on the part of the plaintiff of the danger. In this case, plaintiff was positioned on top of a railroad car in order to provide a repair estimate. Defendant's driver moved the railroad car with a tractor while the plaintiff was in that position. Comparative fault instruction submitted plaintiff's failure to wait to inspect the trailer until it had been parked and the tractor was removed or in failing to warn anyone operating the tractor that he was on top of the trailer. *Lear v. Norfolk & Western Ry. Co.*, 815 S.W.2d 12 (Mo.App. W.D. 1991).

It is permissible for a defendant to rely on multiple defense even though inconsistent. In this case, defendant denied that he was the operator of the motor vehicle in which decedent was a passenger and also submitted comparative negligence on the part of decedent while riding with him while defendant was drunk. *Michael v. Kowalski*, 813 S.W.2d 6 (Mo.App. W.D. 1991).

Error in giving comparative fault instruction is harmless when jury apportions no percentage of fault to defendant. *Vasseghi v. McNutt*, 811 S.W.2d 453 (Mo.App. W.D. 1991).

There was no prejudicial error in the trial court's use of a verdict directing instruction on comparative fault which stated at the bottom "submitted by defendant." *Washburn v. Grundy Electric Cooperative*, 804 S.W.2d 424 (Mo.App. W.D. 1991).

Evidence in wrongful death case against electric utility supported an instruction calling for assessment of percentage of fault to decedent if decedent "failed to keep a careful lookout for electric lines" or "decedent caused or contributed to cause pool skimmer to come into contact with electrical line." *Berra v. Union Electric Company*, 803 S.W.2d 188 (Mo.App. E.D. 1991).

In negligence action, trial court was not obligated to give jury instruction on comparative fault where defendant did not request such an instruction. *Henderson v. Terminal R.R. Assoc. of St. Louis*, 736 S.W.2d 594 (Mo.App. E.D. 1987).

In a negligence case, where there is evidence from which a jury could find that plaintiff's conduct was a contributing cause of his damages, unless the parties agree otherwise, the case should be submitted to the jury under the instructions and verdict forms approved for use in comparative fault cases regardless of whether the defendant submits an affirmative defense instruction or not. *Earll v. Consolidated Aluminum Corp.*, 714 S.W.2d 932 (Mo.App. E.D. 1986).

Error in giving a comparative fault instruction harmless where jury found no negligence on the part of defendant. *Hyman v. Robinson*, 713 S.W.2d 300 (Mo.App. E.D. 1986).

2. Multiple defendants

In case involving multiple defendants, only one affirmative defense comparative fault instruction should have been given, and the court erred when it gave two. Error, however, was not prejudicial since jury found one defendant free from fault and thus would not have had to consider the affirmative defense with respect to that defendant. *Cornell v.*

Texaco, Inc., 712 S.W.2d 680 (Mo.banc 1986).

Where there were multiple defendants, it was error to submit more than one affirmative defense comparative fault instruction, but such error was not prejudicial where jury found that defendants were not guilty of any negligence that caused damage to plaintiff. *Edwards v. Teeters*, 781 S.W.2d 549, 550–51 (Mo.App. S.D. 1989).

Damages instruction MAI 5.01, modified in accordance with MAI 37.03 to submit comparative fault, that permitted the jury to consider aggravating circumstances in assessing damages in wrongful death action is proper when the defendant could have reasonably been charged with knowledge of potentially dangerous situation but failed to act to prevent or reduce danger. *Blum v. Airport Term. Serv., Inc.*, 762 S.W.2d 67, 72–73 (Mo.App. E.D. 1988).

3. Humanitarian doctrine

Where comparative fault instruction was waived by defendant in negligence action, court properly submitted plaintiff's common law humanitarian negligence instruction (MAI 17.15) to jury, even though that doctrine has been replaced by comparative negligence. *Henderson v. Terminal R.R. Assoc. of St. Louis*, 736 S.W.2d 594 (Mo.App. E.D. 1987).

37.03 [1986 New] Damages

If you assess a percentage of fault to [any][1] defendant, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain in the future][2] as a direct result of the occurrence[3] mentioned in the evidence. You must state such total amount of plaintiff's damages in your verdict.

In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.

Notes on Use (2002 Revision)

1. Insert if more than one defendant.

2. This may be added if supported by the evidence.

3. When the evidence discloses a compensable event and a noncompensable event, both of which are claimed to have caused damage, the term "occurrence" may need to be modified. See *Vest v. City National Bank & Trust Co.*, 470 S.W.2d 518 (Mo. 1971). When the term "occurrence" is modified, substitute some descriptive phrase that specifically describes the compensable event.

The first example in Note 3 of MAI 4.01, " . . . as a direct result of the conduct of defendant as submitted in Instruction Number ________", is not appropriate in a comparative fault case because the jury is instructed to determine "total damages," which are obviously the direct result of the conduct of *both* the defendant *and* the plaintiff. The above-quoted example would inappropriately restrict the jury's assessment of damages to those damages solely caused by defendant's conduct.

In a simple comparative fault case, the first example in Note 3 of MAI 4.01, " . . . as a direct result of the automobile collision", may be an appropriate modification of the word "occurrence" if plaintiff sustained damage in an automobile collision but also had a noncompensable illness.

In a case such as *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo.banc

1998), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the occurrence mentioned in the evidence" from this instruction and substitute the phrase "that *(describe the compensable event or conduct)* directly caused or directly contributed to cause."

In a more complex comparative fault case, it may be more appropriate to delete the entire phrase " . . . as a direct result of the occurrence mentioned in the evidence" and substitute the phrase "that the [fault][a] [condition of the product][b] [failure][c] of the defendant directly caused or directly contributed to cause."

a. b. c. Select the appropriate term. If there is more than one defendant, or theory, more than one term may be appropriate.

a. The term "fault" will generally be appropriate.

b. The term "condition of the product" may be used in those cases involving product liability under MAI 25.04 and MAI 25.05.

c. The term "failure" may be used in those cases involving submission under instructions such as MAI 22.02, MAI 22.03, MAI 22.05, MAI 22.07, and similar instructions in which the defendant's actionable conduct is described as a "failure" as opposed to "negligence."

Other modifications may also be appropriate. See MAI 4.01 for further discussion.

In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01.

Committee Comment (1986 New)

A. When appropriate, other damage instructions such as those applicable to wrongful death, etc., may be modified in the format of this instruction to submit comparative fault.

Research References

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Annotations

In general 1

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1. In general

In comparative fault case, a determination of damages cannot survive independent of the accompanying determination of liability; where a finding on liability is reversed, the finding on damages must also be reversed. *Barlett v. Kansas City So. Ry. Co.*, 854 S.W.2d 396 (Mo.banc 1993).

Failure of trial court to modify phrase "as a direct result" in damage instruction, to conform to phrase "directly caused or directly contributed to cause" in verdict directing instruction, engendered confusion for jury and prejudiced plaintiff, entitling her to new trial on issue of damages in personal injury action arising from motor vehicle accident; evidence was presented that plaintiff experienced multiple possible causes for injuries to her body, i.e., automobile accident and prior and subsequent work-related injuries, and jury may have been confused as to how to award damages. *Snelling v. Gress*, 996 S.W.2d 538 (Mo.App. W.D. 1999).

Defendant in comparative fault strict liability-failure to warn case was not entitled to jury instruction on present value of plaintiff's future economic loss, stating that future damages should be valued at their present worth; appropriate instruction on recovery of future damages was MAI 37.03, which was submitted. *Cole v. Goodyear Tire & Rubber Co.*, 967 S.W.2d 176 (Mo.App. E.D. 1998).

37.04 [1986 New] Converse Instructions—Plaintiff or Defendant

In a converse instruction using the "unless you believe" introduction in a comparative fault case, the initial phrase of the converse instructions should be modified as follows:

> In your verdict, you must not assess a percentage of fault to [defendant] [plaintiff][1] unless you believe . . .

The remainder of the converse instruction would then be derived from one or more of the substantive elements of the instruction being conversed under the rules governing converse instructions under MAI 33.01. Thus, if a converse derived from MAI 33.03(1) is used in a comparative fault case, it would read as follows:

> In your verdict, you must not assess a percentage of fault to defendant unless you believe defendant violated the traffic signal.

Notes on Use (1986 New)

1. Under the system of pure comparative fault the plaintiff now is on precisely the same basis as the defendant with respect to the use of converse instructions using the "unless you believe" introduction. Select the appropriate term. Both the plaintiff and the defendant are entitled to submit instructions conversing the instruction submitted by the opposing party on which an assessment of a percentage of fault may be made by the jury.

Research References

West's Key Number Digest
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Annotations

In general 1

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1. In general

It was proper to modify MAI converse instruction so as to inform the jury that their verdict must not assess a percentage of fault to defendants, rather than instructing the jury that its verdict must be for the defendants, where the comparative fault verdict form did not permit the jury to find in favor of plaintiff or defendant but only to assess percentages of fault to one or the other or to both. *McMullin v. Politte*, 780 S.W.2d 94 (Mo.App. E.D. 1989).

37.05(1) [2012 Revision] Vicarious Liability—Agency in Issue

Servant Not Joined

Where defendant master or principal is sued without joinder of the alleged servant or agent in a comparative fault case and agency is at issue, the initial phrase of the verdict directing instruction against the master or principal should read as follows:

> In your verdict, you must assess a percentage of fault to defendant *(name of alleged master)*, whether or not plaintiff was partly at fault, if you believe:

Thus, if the example in MAI 18.01 is used in such a comparative fault case, it would read as follows:

> In your verdict, you must assess a percentage of fault to defendant Ajax, whether or not plaintiff was partly at fault, if you believe:
>
> First, driver Jones was operating the Ajax Company motor vehicle within the scope and course of his employment by Ajax [at the time of the collision],[1] and
>
> Second, Jones violated the traffic signal, and
>
> Third, Jones was thereby negligent,[2] and
>
> Fourth, such negligence[2] directly caused or directly contributed to cause damage to plaintiff.[3]
>
> In assessing any such percentage of fault against Defendant Ajax, you must consider any fault of driver Jones as the fault of defendant Ajax.

Insert the master's name in the verdict form for apportionment of fault in such a case when the master is sued without joinder of the servant, agency is in issue, and the master's liability is submitted only on the basis of the servant's conduct. In this type of case, there is no need for the verdict form to contain a separate space for the finding on the agency issue.

Both Master and Servant Joined

Where the master and servant are both joined as parties in a comparative fault case and agency is in issue, the verdict directing instruction against the servant will be a typical verdict directing instruction such as MAI 37.01. Since the verdict directing instruction contains those elements relevant to the fault of the servant, the only remaining issue relating to the master will be the agency issue. Under these circumstances, it is not necessary to repeat the elements relating to the servant's negligence in the verdict directing instruction against the master. Thus, the verdict directing instruction against the master would read as follows, utilizing MAI 18.01:

> In your verdict, you must find defendant Ajax responsible for any percentage of fault you may assess to defendant Jones, whether or not plaintiff was partly at fault, if you believe driver Jones was operating the Ajax Company motor vehicle within the scope and course of his employment by Ajax.

In preparing the verdict form for apportionment of fault in such a case where the master's liability is submitted only on the servant's conduct, the servant is also joined, and agency is in issue, the following should be inserted as the first paragraph in the comparative fault verdict form:

Note: Complete the following paragraph by writing the word(s) required by your verdict.

> On the claim of plaintiff for personal injury against defendant *(name of master)*, we, the undersigned jurors, ____________ find *(name of master)* responsible for any
> ("do" or "do not")
> percentage of fault assessed to *(name of servant)*.

In the remaining paragraphs of the comparative fault verdict form, only the name of the alleged servant will be listed in the space provided for assessment of percentages of fault. The master's liability for the percentage of fault assessed to the servant is then a matter of law based on the finding by the jury on the agency issue. *See* MAI 35.04.

Notes on Use (1986 New)

1. Use bracketed term if in issue.

2. Where the term "negligent" or "negligence" is used, it must be defined. *See* Chapter 11.00.

3. Paragraph Fourth of the example in MAI 18.01 is shown here MAI 21.04, Modified in accordance with the first alternate of MAI 19. 01.

Committee Comment (1996 Revision)

A. Where the liability of the master or principal is based on vicarious liability, only the conduct of the servant is to be considered in relation to the conduct of the plaintiff in assessing fault. See Note on Use No. 3, MAI 4.12; Note on Use No. 5 MAI 4.13; and Note on Use No. 2 to MAI 4.14 for similar treatment of a vicarious liability situation in apportioning fault between defendants under *Missouri Pacific R.R. Co. v. Whitehead & Kales Co.*, 566 S.W.2d 466 (Mo.banc 1978).

B. If a plaintiff seeks to recover in a comparative fault case from a master or principal based on both respondeat superior and also based upon the negligent acts of the master (i.e., based on the negligent driving of the employee and also based on the employer's negligence in furnishing a truck with defective brakes), then the jury should be asked to assess one percentage of fault based on the employee's driving, a different percentage of fault based on the employer's conduct in furnishing the truck with defective brakes, and another percentage of fault based on the conduct of the plaintiff. In this instance, the comparative fault verdict form would have a blank for the employee's percentage of fault (which is chargeable to both the employee and the employer); another blank for a percentage of fault for the employer's conduct as submitted in the verdict director submitting the employer's conduct in furnishing the truck with bad brakes (this fault is chargeable only to the master); and a blank for the percentage of fault assessed to plaintiff. However, in *McHaffie v. Bunch*, 891 S.W.2d 822 (Mo.banc 1995), the Supreme Court held that once an employer has admitted respondeat superior liability, it is improper to allow plaintiff to submit another theory of *imputed* liability against the employer (as distinguished from another theory of independent negligence).

Research References

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37.05(2) [1986 New] Vicarious Liability—Agency Not Disputed

Where the master or principal is sued with the servant or agent, and there is no issue of agency, a single verdict directing instruction may be directed against both the master and servant. An example follows:

> In your verdict, you must assess a percentage of fault to defendants Ajax and Jones, whether or not plaintiff was partly at fault, if you believe:
>
> First, defendant Jones violated the traffic signal, and
>
> Second, defendant Jones was thereby negligent, and
>
> Third, such negligence directly caused or directly contributed to cause damage to plaintiff.
>
> In assessing any such percentage of fault against Ajax and Jones, you must consider them both as one party and assess only the fault of Jones as the fault of both.

In preparing the verdict form for apportionment in such a case where the master's liability is submitted only on his servant's conduct, and agency is not in dispute, insert the names of both master and servant on the same line in accordance with the direction to the jury to assess only the fault of the servant as the fault of both.

Committee Comment (1986 New)

A. Where the master is sued on a theory of vicarious liability for the fault of a servant, agency is not in dispute, and the servant is not joined as a party, the following example may be followed for submission of the case against the master:

> In your verdict, you must assess a percentage of fault to defendant Ajax, whether or not plaintiff was partly at fault, if you believe:

First, driver Jones violated the traffic signal, and

Second, driver Jones was thereby negligent, and

Third, such negligence directly caused or directly contributed to cause damage to plaintiff.

In assessing any such percentage of fault against defendant Ajax, you must consider the fault of driver Jones as the fault of defendant Ajax.

B. In preparing the verdict form for apportionment in such a case where only the master is sued for vicarious liability, only the master's name should be inserted.

Research References

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Annotations

In general 1
Assumption of facts 2

1. In general

Instruction advising jury that conduct of agent served as basis for determination of any possible percentage of fault to be assessed against master is not needed in noncomparative fault negligent verdict director; jury is instructed that verdict for plaintiff and against defendant master must be returned if agent was negligent as submitted. *Cline v. William H. Friedman & Associates, Inc.*, 882 S.W.2d 754 (Mo.App. E.D. 1994).

2. Assumption of facts

Verdict-directing instruction which stated that jury was required to consider fault of doctor as fault of his employer assumed as undisputed fact that fault was attributable to doctor and impermissibly assumed controverted fact in medical malpractice action. *Cline v. William H. Friedman & Associates, Inc.*, 882 S.W.2d 754 (Mo.App. E.D. 1994).

Verdict-directing instruction must require jury to find all necessary elements of plaintiff's case, except for uncontroverted facts; it is reversible error for instruction to assume or ignore controverted fact. *Cline v. William H. Friedman & Associates, Inc.*, 882 S.W.2d 754 (Mo.App. E.D. 1994).

37.06 [1986 New] Complete Affirmative Defenses

Although fault is eliminated as a total, recovery-defeating defense by the doctrine of comparative fault, some other recovery-defeating affirmative defenses remain, e.g., a full release. When such an affirmative defense is submitted in a claim in which comparative fault must be apportioned, the initial phrase of the affirmative defense instruction should be modified as follows:

> In your verdict, you must not assess a percentage of fault to defendant if you believe:

The remaining paragraphs of the affirmative defense instruction would be derived from an affirmative defense instruction where comparative fault is not submitted. Thus, if affirmative defense instruction MAI 32.21 were to be modified for use in a comparative fault case, it would read as follows:

> In your verdict, you must not assess a percentage of fault to defendant if you believe:
>
> First, plaintiff signed and delivered the release to defendant, and
>
> Second, plaintiff was paid $________[1] for such release.

* [unless you find for plaintiff under Instruction Number ________ *(here insert number of plaintiff's instruction which hypothesizes that the release is not effective, such as MAI 32. 22)*].

Notes on Use (1986 New)

1. If plaintiff's consideration was something other than money, modify Paragraph Second to describe the consideration received.

This instruction is to be given only when there is a disputed issue as to whether plaintiff gave a release. If the plaintiff disputes executing the release and claims in the alternative that if a release was given, it was obtained by fraud, then this instruction should be given along with the bracketed phrase shown. If the plaintiff admits plaintiff gave the release for consideration but claims that it was obtained by fraud, then neither this instruction nor MAI 32.22 should be given. The issues which would otherwise be given in MAI 32.22 should be added to plaintiff's verdict director. See Notes on Use, MAI 32.22.

* Add in the event plaintiff submits an avoidance of release.

Committee Comment (1986 New)

A. For financial responsibility releases, which release both the party giving the release and the party obtaining the release, see *Eberting v. Skinner*, 364 S.W.2d 829 (Mo.App. 1963) and *Farmer v. Arnold*, 371 S.W.2d 265 (Mo. 1963).

B. MAI 37.06 should be used only to submit affirmative defenses that constitute a complete bar to recovery. It should not be used to submit comparative fault.

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37.07 [1986 New] Form of Verdict—Plaintiff vs. Defendant

VERDICT ________[1]

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff *(state the name)* for personal injury,[2] we, the undersigned jurors, assess percentages of fault as follows:

Defendant[3]	*(state the name)*	________%	(zero to 100%)
Plaintiff	*(state the name)*	________%	(zero to 100%)
	TOTAL	________%	(zero OR 100%)

Note: Complete the following paragraph if you assessed a percentage of fault to defendant:

We, the undersigned jurors, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be $________ *(stating the amount)*.

Note: The judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________
______________________	______________________

Notes on Use (1986 New)

1. Verdicts will be designated alphabetically A, B, C, etc.

2. The verdict form will contain a descriptive phrase describing and identifying the claim submitted by this particular package, which will be the claim to which this verdict is applicable. The identifying phrase should be non-inflammatory and as neutral as possible and should avoid the assumption of disputed facts. See MAI 2.00 General Comment, § F, for a discussion and for examples of the appropriate identifying phrase.

3. The names of those against whom fault may be assessed must be inserted in the form of verdict by the preparer of the form.

Caution: The modification necessary to submit apportionment of fault among parties not sued by plaintiff depends upon substantive issues which may not yet be resolved. The Committee takes no position on unresolved substantive issues.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last document in each such package. See MAI 2.00 General Comment for an explanation of "packaging."

Verdict forms should not be read by the Court to the jury.

Committee Comment (1998 New)

A. In comparative fault cases, the jury assesses total damages disregarding any fault on the part of plaintiff and assesses percentages of fault to the parties. The trial judge uses these jury findings to compute the plaintiff's actual recovery by reducing the "total damages" by the percentage of fault assessed to plaintiff.

B. In MAI 37.07, the jury is reminded of these distinct functions by the language "The judge will reduce the total amount of plaintiff's damages . . .." In MAI 37.09, slightly different language is used, i.e., "The judge will compute the recovery of each plaintiff . . .." This difference in MAI 37.09 was deliberately adopted by the Committee to accommodate, without modification, more complex cases in which there might be more than one percentage of fault to consider in the computation (for instance, legally submissible fault on the part of both the primary and the derivative claimants). However, this difference was not intended to preclude argument by counsel with respect to the respective roles of the judge and jury, the method and manner of completing the verdict form, and the net effect (net recovery) of the jury findings. See "Why and How to Instruct a Jury", p. LXX, pointing out that a proper function of counsel in argument is to "flesh out" the instructions by explanation and illustration.

Research References

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Annotations

In general 1

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1. In general

Comparative fault does not apply in a strict products liability case, but the giving of MAI 32.23 is not precluded in the appropriate case. *Lippard v. Houdaille Industries, Inc.*, 715 S.W.2d 491 (Mo.banc 1986). See §§ 537.765 *et seq.*, RSMo.

MAI 37.07 correctly states the law. *Nagy v. Missouri Highway and Transportation Comm.*, 829 S.W.2d 648 (Mo.App. E.D. 1992).

Father brought action for death of his minor daughter. Daughter was a passenger in a car operated by boyfriend of mother (ex-wife of father). Suit was also against driver of another vehicle. Counsel for driver of other vehicle repeatedly argued, during closing argument, that mother was negligent for allowing her daughter to ride with intoxicated boyfriend. Jury apportioned fault to boyfriend and mother. Held: Verdict form erroneously allowed assessment of percentage of fault to mother on an unpleaded theory. *Bradley v. Waste Management of Missouri, Inc.*, 810 S.W.2d 525 (Mo.App. E.D. 1991).

In a negligence case, where there is evidence from which a jury could find that plaintiff's conduct was a contributing cause of his damages, unless the parties agree otherwise, the case should be submitted to the jury under the instructions and verdict forms approved for use in comparative fault cases regardless of whether the defendant submits an affirmative defense instruction or not. *Earll v. Consolidated Aluminum Corp.*, 714 S.W.2d 932 (Mo.App. E.D. 1986).

37.08 [1991 New] Damages—Personal Injury and Loss of Consortium, Loss of Services or Medical Expenses—Spouse or Child Injured

If you assess a percentage of fault to [any][1] defendant, then, disregarding any fault on the part of plaintiff *(name of plaintiff with primary claim)*, you must determine the total amount of damages of plaintiff *(name of plaintiff with primary claim)* on [his] [her][2] claim for personal injury. If you further find that plaintiff *(name of plaintiff with derivative claim)* did sustain damage as a direct result of injury to [his] [her] [husband] [wife] [child],[2] you must determine the total amount of [his] [her][2] damages on [his] [her][2] claim for damages due to injury to [his] [her] [husband] [wife] [child].[2]

Total damages on each claim must be such sum as will fairly and justly compensate the plaintiff on that claim for any such damages you believe that plaintiff sustained [and is reasonably certain to sustain in the future][3] as a direct result of the occurrence[4] mentioned in the evidence. You must state separately in your verdict the total amount of each plaintiff's damages on each claim.

In determining the total amount of each plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to plaintiff *(name of plaintiff with primary claim)*. The judge will compute the recovery of each plaintiff under the law and the percentages of fault you assess.

Notes on Use (2002 Revision)

1. Insert if more than one defendant.

2. Select appropriate word(s).

3. This may be added if supported by the evidence.

4. When the evidence discloses a compensable event and a noncompensable event, both of which are claimed to have caused damage, the term "occurrence" may need to be modified. *See*, *Vest v. City National Bank & Trust Co.*, 470 S.W.2d 518 (Mo. 1971). When the term "occurrence" is modified, substitute some descriptive phrase that specifically describes the compensable event.

The first example in Note 3.a of MAI 4.01, " . . . as a direct result of the conduct of defendant as submitted in Instruction Number ________", is not appropriate in a comparative fault case because the jury is instructed to determine "total damages," which are obviously the direct result of the conduct of *both* the defendant *and* the plaintiff. The above-quoted example would inappropriately restrict the jury's assessment of damages to those damages solely caused by defendant's conduct.

In a simple comparative fault case, the example in Note 3.a of MAI 4.01, " . . . as a direct result of the automobile collision", may be an appropriate modification of the word "occurrence" if plaintiff sustained damage in an automobile collision but also had a non-compensable illness.

In a case such as *Carlson v. K-Mart Corp.*, 979 S.W.2d 145 (Mo.banc 1998), where MAI 19.01 is used in the verdict director, delete the entire phrase "as a direct result of the occurrence mentioned in the evidence" from this instruction and substitute the phrase "that *(describe the compensable event or conduct)* directly caused or directly contributed to cause."

In a more complex comparative fault case, it may be more appropriate to delete the entire phrase " . . . as a direct result of the occurrence mentioned in the evidence" and substitute the phrase "that the [fault][a] [condition of the product][b] [failure][c] of the defendant directly caused or directly contributed to cause."

a. b. c. Select the appropriate term. If there is more than one defendant, or theory, more than one term may be appropriate.

a. The term "fault" will generally be appropriate.

b. The term "condition of the product" may be used in those cases involving product liability under MAI 25.04 and MAI 25.05.

c. The term "failure" may be used in those cases involving submission under instructions such as MAI 22.02, MAI 22.03, MAI 22.05, MAI 22.07, and similar instructions in which the defendant's actionable conduct is described as a "failure" as opposed to "negligence."

Other modifications may also be appropriate. See MAI 4.01 for further discussion. In a case in which mitigation of damages is properly submitted under MAI 32.29, this damage instruction should be modified with the bracketed sentence required by Note 4 of the Notes on Use to MAI 4.01. In a case involving combined primary and derivative claims, the law of Missouri has not yet developed to indicate whether mitigation of damages instructions may be given on both claims or only on the primary injury claim. The Committee takes no position on this issue.

Committee Comment (1991 New)

A. This is a damage instruction for both the primary and derivative claims in a comparative fault case involving both a personal injury claim and a derivative loss of consortium, loss of services or medical expense claim. See MAI 31.04 for the appropriate verdict directing instruction for the derivative claim and MAI 37.09 for the appropriate verdict form. *See also* MAI 35.16.

B. See MAI 4.18 for the damage instruction in a non-comparative fault case submitting both a primary claim and a derivative claim.

Research References

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Annotations

In general 1

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1. In general

The Missouri Supreme Court refused to recognize a cause of action for loss of parental consortium (consortium action by child due to injury to parent) or filial consortium (consortium action by sibling due to injury to another sibling). *Powell v. American Motors Corp.*, 834 S.W.2d 184 (Mo.banc 1992).

37.09 [1991 New] Form of Verdict—Combined Injury and Derivative Claims

VERDICT ______[1]

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%; otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

We, the undersigned jurors, assess percentages of fault as follows:

Defendant[2]	*(state the name)*	______%	(zero to 100%)
Plaintiff[2]	*(state the name)*	______%	(zero to 100%)
	TOTAL	______%	(zero OR 100%)

Note: Complete the following paragraphs if you assessed a percentage of fault to [any][3] defendant.

On the claim of plaintiff *(state name of plaintiff with primary claim)* for personal injury, we, the undersigned jurors, find the total amount of damages of plaintiff *(state name of plaintiff with primary claim)*, disregarding any fault on the part of plaintiff *(state name of plaintiff with primary claim)*, to be $______ *(stating the amount)*.

Note: Complete the following paragraph by writing in the word(s) required by your verdict.

On the claim of plaintiff *(state name of plaintiff with*

derivative claim) for damages due to injury to [his] [her] [husband] [wife] [child],[4] we, the undersigned jurors, find that plaintiff *(state name of plaintiff with derivative claim)* ____________ sustain damage as a direct result of injury to
("did" or "did not")
[his] [her] [husband] [wife] [child].[4]

Note: Complete the following paragraph only if the above finding is that plaintiff *(state name of plaintiff with derivative claim)* "did" sustain such damage.

We, the undersigned jurors, find the total amount of damages of plaintiff *(state name of plaintiff with derivative claim)* due to injury to [his] [her] [husband] [wife] [child],[4] disregarding any fault on the part of plaintiff *(state name of plaintiff with primary claim)*, to be $________ *(stating the amount).*

Note: The judge will compute the recovery of each plaintiff under the law and the percentages of fault you assess.

Note: All jurors who agree to the above must legibly sign or print their names below.

____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________
____________________	____________________

Notes on Use (1991 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. The names of those against whom fault may be assessed must be inserted in the form of verdict by the preparer of the form.

3. Insert if more than one defendant.

4. Select appropriate word(s).

Caution: The modification necessary to submit apportionment of fault among parties not sued by plaintiff depends upon substantive issues that may not yet be resolved. The Committee takes no position on unresolved substantive issues.

Parenthetical directions to "*(state the name)*" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last document in each such package. See MAI 2.00 General Comment for an explanation of "packaging".

Committee Comment (1998 New)

A. In comparative fault cases, the jury assesses total damages disregarding any fault on the part of plaintiff and assesses percentages of fault to the parties. The trial judge uses these jury findings to compute the plaintiff's actual recovery by reducing the "total damages" by the percentage of fault assessed to plaintiff.

B. In MAI 37.07, the jury is reminded of these distinct functions by the language "The judge will reduce the total amount of plaintiff's damages . . .." In MAI 37.09, slightly different language is used, i.e., "The judge will compute the recovery of each plaintiff . . .." This difference in MAI 37.09 was deliberately adopted by the Committee to accommodate, without modification, more complex cases in which there might be more than one percentage of fault to consider in the computation (for instance, legally submissible fault on the part of both the primary and the derivative claimants). However, this difference was not intended to preclude argument by counsel with respect to the respective roles of the judge and jury, the method and manner of completing the verdict form, and the net effect (net recovery) of the jury findings. See "Why and How to Instruct a Jury", p. LXXVI, pointing out that a proper function of counsel in argument is to "flesh out" the instructions by explanation and illustration.

Research References

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38.00

EMPLOYMENT DISCRIMINATION

38.01(A) Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing before August 28, 2017)
38.01(B) Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability—Existence of Disability Disputed (for actions accruing before August 28, 2017)
38.02 Missouri Human Rights Act—Lawful Justification (for actions accruing before August 28, 2017)
38.03 Verdict Directing—Wrongful Discharge in Violation of Public Policy
38.04 Verdict Directing—Retaliatory Discharge or Discrimination—Workers' Compensation (for actions accruing before August 28, 2017)
38.05 Verdict Directing—Retaliatory Discharge or Discrimination—Workers' Compensation (for actions accruing on or after August 28, 2017)
38.06 Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing on or after August 28, 2017)
38.07 Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability—Existence of Disability Disputed (for actions accruing on or after August 28, 2017)
38.08 Missouri Human Rights Act—Business Judgment Rule (for actions accruing on or after August 28, 2017)
38.09 Missouri Human Rights Act—Damages (for actions accruing on or after August 28, 2017)
38.10 Missouri Human Rights Act—Verdict Form (for actions accruing on or after August 28, 2017)

Research References

West's Key Number Digest

Civil Rights 🔑1118, 1166, 1201, 1243, 1252, 1753; Labor and Employment 🔑776 to 780

A.L.R. Library

A.L.R. Index, Equal Employment Opportunity; Instructions to Jury
West's A.L.R. Digest, Civil Rights 🔑1118, 1166, 1201, 1252, 1243, 1753

Legal Encyclopedias

Am. Jur. 2d, Job Discrimination §§ 2417, 2429, 2474

C.J.S., Civil Rights §§ 743, 799

38.01(A) [2018 Revision] Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing before August 28, 2017)

Your verdict must be for plaintiff if you believe:

First, defendant *(here insert the alleged discriminatory act, such as "failed to hire," "discharged" or other act within the scope of § 213.055, RSMo)*[1,2] plaintiff, and

Second, (*here insert one or more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, age or disability)*[3] was a contributing factor in such (*here, repeat alleged discriminatory act, such as "failure to hire," "discharge," etc.*), and

Third, as a direct result of such conduct, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ____ (*here insert number of affirmative defense instruction*)].[4]

Notes on Use (2014 Revision)

1. If the evidence in the case demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in § 213.055, RSMo, then Paragraph First of this instruction may be appropriately modified.

2. Where the status of the plaintiff's membership in a protected class is at issue, except in cases involving disability discrimination (see MAI 38.01(B)), Paragraph First in the verdict directing instruction shall be in the following form:

> First, plaintiff is *(here insert one of more of the protected classifcations supported by the evidence such as race, color, religion, national origin, sex, ancestry, or age)*, and

The remaining paragraphs of the verdict directing instruction must be renumbered.

3. Use only where plaintiff's disability is not at issue. Where plaintiff's disability is disputed, use MAI 38.01(B).

4. In including guidance on how to instruct in instances where an affirmative defense is submitted, the Committee takes no position as to the availability of affirmative defenses in Missouri Human Rights Act cases. See, *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. S.D. 2012).

* Add if affirmative defense is submitted. This bracketed phrase should not be used to submit lawful justification under MAI 38.02.

Committee Comment (2018 Revision)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

> **1.** It shall be an unlawful employment practice:
>
> (1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:
>
> (a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability.

B. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo.banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo.

C. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo.banc 2006).

D. In *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo.banc 2012), the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2. Do not use this instruction for a disability discrimination claim where the issue of disability is disputed. Where plaintiff's disability is disputed, use MAI 38.01(B).

E. In *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. S.D. 2012), the court questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

F. *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App.

W.D. 2012), addressed the issue of causation in a Missouri Human Rights Act claim in view of the trial court's attempt to provide the jury with a curative instruction based upon a "but for" argument in closing. In reversing the trial court, the court in *Thomas* stated:

> The trial court's wording of the but for issue—"but for . . . their age . . ., they would not have been terminated"—effectively told the jury that it would not be enough for Appellants to prove that their age was an actual contributing cause of their discharge. Under the law, Appellants could prevail if the jury believed that age was a "contributing factor" in their discharge; this oral instruction said they could prevail only if the jury believed that their age was ***the*** cause, in and of itself, of their discharge. 388 S.W.3d at 216.

The court acknowledged that terms such as "but for causation" are not to be used when instructing the jury as it creates the potential for confusion. It is generally error for a trial court to attempt to instruct the jury on "but for causation." But see, S.B. 43 (2017) and Historical Note, below.

G. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. W.D. 2014). But see, S.B. 43 (2017) and Historical Note, below.

Historical Note (2018 Revision)

(MAI 38.01(A) replaces the prior MAI 31.24 (2005 New).

S.B. 43 (2017), 99th General Assembly states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo.banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. W.D. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. W.D. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. E.D. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017).

Research References

West's Key Number Digest
Civil Rights ⚷1118, 1166, 1201, 1243, 1252, 1753

Legal Encyclopedias
C.J.S., Civil Rights §§ 743, 799

Annotations

1. In general

An adverse employment decision based on sex-based stereotypical attitudes of how a member of the employee's sex should act could support an inference of unlawful sex discrimination. *Lampley v. Missouri Com'n on Human Rights*, 570 S.W.3d 16 (Mo.banc 2019).

Transgender FtM student whose "legal sex" was male alleged facts sufficient to survive motion to dismiss on sex discrimination claim for refusing to let him use male locker room. *R.M.A. by Appleberry v. Blue Springs R-IV School Dist.*, 568 S.W.3d 420 (Mo.banc 2019).

When disjunctive verdict directing instructions were not each supported by substantial evidence, the instructions were prejudicial and warranted reversal. *Kader v. Bd. Of Regents of Harris-Stowe State Univ.*, 565 S.W.3d 182 (Mo.banc 2019).

Submission of disjunctive verdict-directing jury instruction, which required jury to return verdict for police officer if city board of police commissioners unjustly refused or delayed officer's disability claim, prejudiced board in officer's action alleging retaliation in violation of Missouri Human Rights Act (MHRA), and thus constituted reversible error; jury found board liable only under the instruction, and although it was clear that jury found in officer's favor on at least one of disjunctive theories submitted to jury, there was no way of discerning which theory the jury chose and thus the Court could not rule out the possibility that the theory was not supported by substantial evidence. *Ross-Paige v. Saint Louis Metropolitan Police Department*, 492 S.W.3d 164 (Mo.banc 2016).

Amendment to MHRA that changed standard used in assessing claims of employment discrimination applied prospectively. *Bram v. AT&T Mobility Services, LLC*, 564 S.W.3d 787 (Mo.App. W.D. 2018).

MRHA does not protect against harassment based on sexual orientation. *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo.App. W.D. 2015).

38.01(B) [2018 Revision] Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability—Existence of Disability Disputed (for actions accruing before August 28, 2017)

Your verdict must be for plaintiff if you believe:

First, plaintiff [has a [physical] [mental] impairment that substantially limits one or more of plaintiff's major life activities] [is regarded as having a [physical] [mental] impairment that substantially limits one or more of plaintiff's major life activities] [has a [physical] [mental] impairment of record that substantially limits one or more of plaintiff's life activities][1] and

Second, such impairment [would not] [did not][2] interfere with performing the job in question [if provided reasonable accommodation] [and did not require any accommodation],[3] and

Third, defendant (*here insert the alleged discriminatory act, such as "failed to hire," "discharged" or other act within the scope of § 213.055, RSMo*)[4] plaintiff, and

Fourth, such disability was a contributing factor in such (*here insert the alleged discriminatory act, such as "failure to hire," "discharge," etc.*), and

Fifth, as a direct result of such conduct, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number (*here insert number of affirmative defense instruction*)].[5]

Notes on Use (2014 New)

1. Select the phrase that applies to the case as supported by the evidence. Use only where plaintiff's disability is disputed. Where plaintiff's disability is not disputed, use MAI 38.01 (A).

2. Select appropriate phrase depending on whether plaintiff was "not hired," or was "discharged," or other alleged discriminatory act set out in § 213.055, RSMo.

3. Select appropriate phrase as supported by the evidence.

4. If the evidence in the case demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in § 213.055, RSMo, then Paragraph Third of this Instruction may be appropriately modified.

5. In including guidance on how to instruct in instances where an affirmative defense is submitted, the Committee takes no position as to the availability of affirmative defenses in Missouri Human Rights Act cases. See, *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. S.D. 2012).

*Add if affirmative defense is submitted. This bracketed phrase should not be used to submit lawful justification under MAI 38.02.

Committee Comment (2018 Revision)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

> **1.** It shall be an unlawful employment practice:
>
> (1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:
>
> > (a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability.

B. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo.banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo.

C. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo.banc 2006).

D. This instruction is based on *Hervey v. Missouri Department of*

Corrections, 379 S.W.3d 156 (Mo.banc 2012), wherein the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2 to MAI 38.01(A). Use this instruction only for disability discrimination claims where the issue of disability is disputed. Where plaintiff's disability is not in dispute use MAI 38.01(A).

E. "Disability" is statutorily defined for purposes of the Missouri Human Rights Act in § 213.010(4), RSMo. For a thorough discussion of the definition of "disability" within the context of a Missouri Human Rights Act claim, see *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. S.D. 2012), where the court addressed that issue as well as the meaning of "reasonable accommodation." The court also questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

F. *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. W.D. 2012), addressed the issue of causation in a Missouri Human Rights Act claim in view of the trial court's attempt to provide the jury with a curative instruction based upon a "but for" argument in closing. In reversing the trial court, the court in *Thomas* stated:

> The trial court's wording of the but for issue—"but for . . . their age . . ., they would not have been terminated"—effectively told the jury that it would not be enough for Appellants to prove that their age was an actual contributing cause of their discharge. Under the law, Appellants could prevail if the jury believed that age was a "contributing factor" in their discharge; this oral instruction said they could prevail only if the jury believed that their age was **the** cause, in and of itself, of their discharge. 388 S.W.3d at 216.

The court acknowledged that terms such as "but for causation" are not to be used when instructing the jury as it creates the potential for confusion. It is generally error for a trial court to attempt to instruct the jury on "but for causation." But see, S.B. 43 (2017) and Historical Note, below.

G. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. W.D. 2014). But see, S.B. 43 (2017) and Historical Note, below.

Historical Note

(S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to

August 28, 2017." See S.B. 43, § 213.101.6, RSMo. If such action conflicts with Art V, § 5 and Art I, § 13 of the Missouri Constitution (1945), then see MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo.banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. W.D. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. W.D. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. E.D. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017).

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Civil Rights 🔑1018, 1753

Legal Encyclopedias
C.J.S., Civil Rights §§ 313 to 320

Annotations

1. In general

An adverse employment decision based on sex-based stereotypical attitudes of how a member of the employee's sex should act could support an inference of unlawful sex discrimination. *Lampley v. Missouri Com'n on Human Rights*, 570 S.W.3d 16 (Mo.banc 2019).

Transgender FtM student whose "legal sex" was male alleged facts sufficient to survive motion to dismiss on sex discrimination claim for refusing to let him use male locker room. *R.M.A. by Appleberry v. Blue Springs R-IV School Dist.*, 568 S.W.3d 420 (Mo.banc 2019).

MRHA does not protect against harassment based on sexual orientation. *Pittman v. Cook Paper Recycling Corp.*, 478 S.W.3d 479 (Mo.App. W.D. 2015).

38.02 [2018 Revision] Missouri Human Rights Act—Lawful Justification (for actions accruing before August 28, 2017)

Your verdict must be for defendant if you believe:

First, defendant (*here insert alleged discriminatory act submitted in plaintiff's verdict directing instruction such as "failed to hire," "discharged" or other act within the scope of § 213.055, RSMo*) plaintiff because (*here set forth the alleged lawful reason such action was taken*), and

Second, in so doing (*here insert the protected classification submitted by plaintiff, such as race, color, religion, national origin, etc.*) was not a contributing factor.

Notes on Use (2017 Revision)

See MAI 38.01(A) and 38.01(B).

If supported by the law and the evidence, an instruction on "lawful justification" may be submitted at the defendant's option, or "lawful justification" may by argued without submission of an instruction on that issue. If such an instruction is submitted, it must be in the form of this MAI 38.02.

Historical Note

(MAI 38.02 replaces the prior MAI 31.25 (2005 New).

S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of*

Maryland Heights, 231 S.W.3d 814 (Mo.banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. W.D. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. W.D. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. E.D. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017).

Research References

West's Key Number Digest
Civil Rights ⚷1118, 1166, 1201, 1243, 1252, 1753

Legal Encyclopedias
C.J.S., Civil Rights §§ 743, 799

38.03 [2012 Revision] Verdict Directing—Wrongful Discharge in Violation of Public Policy

Your verdict must be for plaintiff if you believe:

First, plaintiff (*here describe plaintiff's act or refusal to act such as "refused to submit duplicate billing to Medicare," or "reported suspected child abuse to the Division of Family Services"*),[1] and

Second, defendant discharged plaintiff, and

Third, such conduct of plaintiff as submitted in paragraph First was a contributing factor in such discharge, and

Fourth, as a direct result of such discharge, plaintiff sustained damage.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ____ *(here insert number of affirmative defense instruction)*].

Notes on Use (2011 New)

1. The act(s) inserted must be in accordance with *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 92 (Mo.banc 2010), which adopted the public policy exception for discharge of an at-will employee stating:

> An at-will employee may not be terminated (1) for refusing to violate the law or any well established and clear mandate of public policy as expressed in the Constitution, statutes, regulations promulgated pursuant to statute, or rules created by a governmental body or (2) for reporting wrongdoing or violations of law to superiors or public authorities.

See also *Keveney v. Missouri Military Academy*, 304 S.W.3d 98 (Mo.banc 2010) (adopting the public policy exception for an employee under contract).

For submitting multiple acts in the disjunctive, refer to the form in MAI 17.02. As is the case with all disjunctive submissions, there must be sufficient evidence to support each submission or the instruction will be erroneous.

* Add if affirmative defense is submitted.

Committee Comment (2018 Revision)

A. If the case involves constructive discharge, demotion, or adverse job consequences, this instruction can be easily modified. The Committee takes no position as to whether the public policy exception applies to cases in which the employee's action has resulted in constructive discharge, demotion, or adverse job consequences.

B. In *Fleshner v. Pepose Vision Institute, P.C.*, 304 S.W.3d 81, 92 (Mo.banc 2010), the employee was discharged for talking to federal investigators about the employer's violation of Fair Labor Standards Act requirements to pay overtime compensation. The Court expressly adopted a public policy exception to the "at will" doctrine where the employee is discharged for reporting violations of law to authorities or for refusing to perform illegal acts. *Id.*

C. The public policy must be found in a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body. However, the public policy need only be *reflected* by a constitutional provision, statute, regulation promulgated pursuant to statute, or a rule created by a governmental body, and there need not be a direct violation by the employer of that same statute or regulation. Additionally, "there is no requirement that the violation that the employee reports affect the employee personally, nor that the law violated prohibit or penalize retaliation against those reporting its violation." *Fleshner*, 304 S.W.3d at 97. Moreover, the public policy is applicable to communications made to federal or state officials as well as to the employee's supervisors. *Fleshner*, 304 S.W.3d at 97. See also, *Margiotta v. Christian Hospital Northeast-Northwest*, 315 S.W.3d 342 (Mo.banc 2010).

D. In *Fleshner*, the Court also cited the "contributing factor" standard expressed in MAI 31.24 with approval as the standard for causation in this type of wrongful discharge case. *Fleshner*, 304 S.W.3d at 94–95. But see, S.B. 43 (2017) and Historical Note at MAI 38.01(A) and 38.01(B).

E. In *Keveney v. Missouri Military Academy*, 304 S.W.3d 98, 103 (Mo.banc 2010), the Court extended the public policy exception to the at-will doctrine to "contract employees" in addition to "at-will" employees.

F. The Court, under the facts in *Keveney*, also determined that in order to survive a motion to dismiss, an employee must plead the following in order to state a cause of action for wrongful discharge under the public policy exception:

(1) That the employee refused to perform an illegal act or act in a manner contrary to public policy;

(2) That the employee was discharged; and

(3) That there is a causal connection between the employee's discharge and the employee's refusal to engage in the actions at issue.

Id. at 103.

G. The *Margiotta* case limited the public policy exception by excluding situations in which the claimed "public policy" is vague or general and not a specific statute, rule, regulation, or constitutional requirement. The Court found that the two regulations cited in *Margiotta* were vague statements and did not specifically proscribe conduct in the alleged incidents. One regulation was extremely broad as to patient safety, and the other regulation clearly dealt with building safety and not patient treatment. For these reasons the Court found that summary judgment was appropriately granted. *Margiotta*, 315 S.W.3d at 347–48.

H. In *Bennartz v. City of Columbia, Missouri*, 300 S.W.3d 251, 261–62 (Mo.App. W.D. 2009), the court held that a municipal employee may not maintain a wrongful discharge cause of action against the municipality or another municipal employee under the public policy exception because the defendants are protected by sovereign immunity.

I. Where suit involves multiple causes of damage, see MAI 19.01 and *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. W.D. 2014). But see, S.B. 43 (2017) and Historical Note at MAI 38.01(A), 38.01(B) and 38.05.

Historical Note

(MAI 38.03 replaces the prior MAI 31.27 (2011 New).

As part of S.B. 43, the 99th General Assembly enacted the "Whistleblowers Protection Act," effective August 28, 2017. Section 287.575.3, RSMo, provides: "This section is intended to codify the existing common law exceptions to the at-will doctrine and to limit their future expansion by the courts. This section, in addition to chapter 213 and chapter 287, shall provide the exclusive remedy for any and all claims of unlawful employment practices."

The Act does not appear to impact causes of action accruing prior to August 28, 2017. The Act seems to explicitly recognize and codify the common law for wrongful discharge in violation of public policy and further seems to explicitly recognize the remedy provided for retaliatory discharge in a Workers Compensation setting under § 287.780, RSMo).

Research References

West's Key Number Digest
Labor and Employment ⚷776 to 780

Legal Encyclopedias
C.J.S., Employer—Employee Relationship §§ 86 to 88

38.04 [2018 Revision] Verdict Directing—Retaliatory Discharge or Discrimination—Workers' Compensation (for actions accruing before August 28, 2017)

Your verdict must be for plaintiff if you believe:

First, plaintiff was employed by defendant, and

Second, plaintiff filed a workers' compensation claim,[1] and

Third, defendant discharged[2] plaintiff, and

Fourth, plaintiff's filing of the workers' compensation claim[1] was a contributing factor to plaintiff's discharge,[2] and

Fifth, as a direct result of such discharge[2] plaintiff sustained damage.

Notes on Use (2000 New)

1. Describe the right exercised by the plaintiff under the workers' compensation law if it was other than filing a claim for compensation.

2. If the claim is for discrimination rather than discharge, describe the act of discrimination, such as "reduced plaintiff's rate of pay" or "demoted plaintiff."

Committee Comment (2018 Revision)

This instruction is for use in a retaliatory discharge case under § 287.780, RSMo, for actions accruing before August 28, 2017. *Templemire v. W & M Welding, Inc.*, 433 S.W.3d 371 (Mo.banc 2014) held that "contributing factor" is the standard for causation in retaliatory discharge under § 287.780, RSMo. Prior cases to the contrary have been overruled. This instruction may be modified to submit acts of discrimination other than discharge where appropriate. For a retaliatory discharge case under § 287.780, RSMo, for actions accruing on or after August 28, 2017, see MAI 38.05.

Historical Note

(As part of S.B. 43, the 99th General Assembly enacted the "Whistleblowers Protection Act," effective August 28, 2017. Section

287.575.3, RSMo, provides: "This section is intended to codify the existing common law exceptions to the at-will doctrine and to limit their future expansion by the courts. This section, in addition to chapter 213 and chapter 287, shall provide the exclusive remedy for any and all claims of unlawful employment practices."

The Act does not appear to impact causes of action accruing prior to August 28, 2017. See MAI 38.03. The Act seems to explicitly recognize and codify the common law for wrongful discharge in violation of public policy and further seems to explicitly recognize the remedy provided for retaliatory discharge in a Workers Compensation setting under § 287.780, RSMo).

Research References

West's Key Number Digest
Labor and Employment ⚷810

Legal Encyclopedias
C.J.S., Employer—Employee Relationship §§ 97 to 98

Annotations

1. In general

When disjunctive verdict directing instructions were not each supported by substantial evidence, the instructions were prejudicial and warranted reversal. *Kader v. Bd. Of Regents of Harris-Stowe State Univ.*, 565 S.W.3d 182 (Mo.banc 2019).

38.05 [2018 New] Verdict Directing—Retaliatory Discharge or Discrimination—Workers' Compensation (for actions accruing on or after August 28, 2017)

Your verdict must be for plaintiff if you believe:

First, plaintiff was employed by defendant, and

Second, plaintiff filed a workers' compensation claim,[1] and

Third, defendant discharged[2] plaintiff, and

Fourth, plaintiff's filing of the workers' compensation claim[1] actually played a role in and had a determinative influence on plaintiff's discharge,[2] and

Fifth, such discharge[2] directly caused damage to plaintiff.

Notes on Use (2018 New)

1. Describe the right exercised by the plaintiff under the workers' compensation law if it was other than filing a claim for compensation.

2. If the claim is for discrimination rather than discharge, describe the act of discrimination, such as "reduced plaintiff's rate of pay" or "demoted plaintiff."

Committee Comment (2018 New)

This instruction is for use in a retaliatory discharge case under § 287.780, RSMo, that accrues on or after August 28, 2017. S.B. 66 (Laws 2017). This instruction may be modified to submit acts of discrimination other than discharge where appropriate.

Historical Note

(As part of S.B. 66 (2017), the 99th General Assembly amended a number of sections of the Missouri Workers' Compensation Act, effective August 28, 2017. S.B. 66 modifies the burden of proof for workers' compensation retaliation claims under § 287.780, RSMo.

Templemire v. W&M Welding, Inc., 433 S.W.3d 371 (Mo.banc 2014) adopted a contributing factor standard for Missouri Human Rights Act claims. Section 287.780 now provides:

> No employer or agent shall discharge or discriminate against any employee for exercising any of his or her rights under this chapter when the exercising of such rights is the motivating factor in the discharge or discrimination. Any employee who has been discharged or discriminated against in such manner shall have a civil action for damages against his or her employer. For purposes of this section, 'motivating factor' shall mean that the employee's exercise of his or her rights under this chapter actually played a role in the discharge or discrimination and had a determinative influence on the discharge or discrimination.

§ 287.780, RSMo.

MAI 38.05 [2018 New] is for use in retaliatory discharge or discrimination claims that accrued on or after August 28, 2017, under the Missouri Workers' Compensation Act).

Research References

West's Key Number Digest
Labor and Employment ⚿810

Legal Encyclopedias
C.J.S., Employer—Employee Relationship §§ 97 to 98

38.06 [2018 New] Verdict Directing—Missouri Human Rights Act—Employment Discrimination (for actions accruing on or after August 28, 2017)

Your verdict must be for plaintiff if you believe:

First, defendant (*here insert the alleged discriminatory act, such as "failed to hire," "discharged" or other act within the scope of § 213.055, RSMo*)[1,2] plaintiff, and

Second, plaintiff's (*here insert one or more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, age or disability*)[3] actually played a role in and had a determinative influence on such action, and

Third, such conduct directly caused damage to plaintiff.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ____ (*here insert number of affirmative defense instruction*)].[4]

Notes on Use (2018 New)

1. If the evidence in the case demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in § 213.055, RSMo, then Paragraph First of this instruction may be appropriately modified.

2. Where the status of the plaintiff's membership in a protected class is at issue, except in cases involving disability discrimination (see MAI 38.07), Paragraph First in the verdict directing instruction shall be in the following form:

> First, plaintiff is *(here insert one of more of the protected classifications supported by the evidence such as race, color, religion, national origin, sex, ancestry, or age)*, and

The remaining paragraphs of the verdict directing instruction must be renumbered.

3. Use only where plaintiff's disability is not at issue. Where plaintiff's disability is disputed, this instruction must be modified. See e.g. MAI 38.07.

4. In including guidance on how to instruct in instances where an affirmative defense is submitted, the Committee takes no position as to the availability of affirmative defenses in Missouri Human Rights Act cases. See, *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. S.D. 2012).

Committee Comment (2018 New)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

> **1.** It shall be an unlawful employment practice:
>
> (1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:
>
> (a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability.

B. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo.banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo. The Missouri legislature specifically recognized such a right to trial by jury in § 213.111.3, RSMo.

C. "Garden variety;" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo.banc 2006).

D. In *Hervey v. Missouri Department of Corrections*, 379 S.W.3d 156 (Mo.banc 2012), the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2. For a disability discrimination claim where the issue of disability is disputed, this instruction must be modified. See e.g., MAI 38.07 and modify accordingly.

E. In *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. S.D. 2012), the court questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

Historical Note

(S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03 and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo.banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. W.D. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. W.D. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. E.D. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017).

Research References

West's Key Number Digest
Civil Rights ⚷1118, 1166, 1201, 1243, 1252, 1753

Legal Encyclopedias
C.J.S., Civil Rights §§ 743, 799

Annotations

1. In general

Amendment to MHRA that changed standard used in assessing claims of employment discrimination applied prospectively. *Bram v. AT&T Mobility Services, LLC*, 564 S.W.3d 787 (Mo.App. W.D. 2018).

38.07 [2018 New] Verdict Directing—Missouri Human Rights Act—Employment Discrimination by Reason of Disability—Existence of Disability Disputed (for actions accruing on or after August 28, 2017)

Your verdict must be for plaintiff if you believe:

First, plaintiff [has a [physical] [mental] impairment that substantially limits one or more of plaintiff's major life activities] [is regarded as having a [physical] [mental] impairment that substantially limits one or more of plaintiff's major life activities] [has a [physical] [mental] impairment of record that substantially limits one or more of plaintiff's life activities][1] and

Second, such impairment [would not] [did not][2] interfere with performing the job in question [if provided reasonable accommodation] [and did not require any accommodation],[3] and

Third, defendant (*here insert the alleged discriminatory act, such as "failed to hire," "discharged" or other act within the scope of § 213.055, RSMo*)[4] plaintiff, and

Fourth, such disability actually played a role in and had a determinative influence on (*here insert the alleged discriminatory act, such as "failure to hire," "discharge," etc.*), and

Fifth, such conduct directly caused damage to plaintiff.

* [unless you believe plaintiff is not entitled to recover by reason of Instruction Number ____ (*here insert number of affirmative defense instruction*)].[5]

Notes on Use

1. Select the phrase that applies to the case as supported by the evidence. Use only where plaintiff's disability is disputed. Where plaintiff's disability is not disputed, use MAI 38.06

2. Select appropriate phrase depending on whether plaintiff was "not hired," or was "discharged" or other alleged discriminatory act set out in § 213.055, RSMo.

3. Select appropriate phrase as supported by the evidence.

4. If the evidence in the case demonstrates a course of conduct or harassment constituting discrimination on any grounds contained in § 213.055, RSMo, then Paragraph Third of this Instruction may be appropriately modified.

5. In including guidance on how to instruct in instances where an affirmative defense is submitted, the Committee takes no position as to the availability of affirmative defenses in Missouri Human Rights Act cases. See, *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. S.D. 2012).

*Add if affirmative defense is submitted. This bracketed phrase should not be used to submit lawful justification under MAI 38.02.

Committee Comment (2018 New)

A. Section 213.055, RSMo, Unlawful Employment Practices, provides in part:

> 1. It shall be an unlawful employment practice:
>
> (1) For an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any individual:
>
> (a) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, national origin, sex, ancestry, age or disability.

B. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo.banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo.

C. "Garden variety" emotional distress under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo, need not be supported by expert testimony. *State ex rel. Dean v. Cunningham*, 182 S.W.3d 561 (Mo.banc 2006).

D. This instruction is based on *Hervey v. Missouri Department of*

Corrections, 379 S.W.3d 156 (Mo.banc 2012), wherein the Court required that the issue as to whether or not plaintiff was a member of a protected class be set forth in this instruction if it is a disputed element. While *Hervey* addressed a disability discrimination cause of action, the holding in this regard is applicable to other protected classifications where membership in that class is in dispute. See Note on Use 2 to MAI 38. 01(A). Use this instruction only for disability discrimination claims where the issue of disability is disputed. Where plaintiff's disability is not in dispute use MAI 38.06.

E. "Disability" is statutorily defined for purposes of the Missouri Human Rights Act in § 213.010(4), RSMo. For a thorough discussion of the definition of "disability" within the context of a Missouri Human Rights Act claim, see *Wells v. Lester E. Cox Medical Centers*, 379 S.W.3d 919 (Mo.App. S.D. 2012), where the court addressed that issue as well as the meaning of "reasonable accommodation." The court also questioned whether the Missouri Human Rights Act provides for the use of any affirmative defense. The Committee takes no position on the availability of affirmative defenses in Missouri Human Rights Act cases.

Historical Note

(S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03 and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo.banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. W.D. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. W.D. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. E.D. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017).

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38.08 [2018 New] Missouri Human Rights Act—Business Judgment Rule (for actions accruing on or after August 28, 2017)

Your verdict must be for defendant if you believe defendant (*here insert the alleged discriminatory act submitted in plaintiff's verdict directing instruction such as "failed to hire," "discharged," or other act within the scope of* §§ 213.055, RSMo)[1] plaintiff because (*here insert non-discriminatory business reason for defendant's action*) as an exercise of sound business judgment without regard to plaintiff's (*here insert the applicable protected classification submitted by plaintiff such as race, color, religion, national origin, etc.*)[2] even if you disagree with such decision or believe it to be harsh.

Notes on Use (2018 New)

1. Select appropriate phrase depending on whether plaintiff was "not hired," or was "discharged," or other alleged discriminatory act.

2. Select appropriate phrase as supported by the evidence.

Committee Comment (2018 New)

S.B. 43 (2017), 99th General Assembly, states "[i]n all civil actions brought under this Chapter (Chapter 213), a jury shall be given an instruction expressing the business judgment rule." See S.B. 43, § 213.101.2. This instruction is for use in actions accruing on or after August 28, 2017.

Historical Note (2018 New)

(S.B. 43 (2017), 99th General Assembly states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03, and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing, disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states "it hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of*

Maryland Heights, 231 S.W.3d 814 (Mo.banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. W.D. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. W.D. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. E.D. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017).

Research References

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Legal Encyclopedias
C.J.S., Civil Rights §§ 313 to 320, 743, 799

38.09 [2018 New] Missouri Human Rights Act—Damages (for actions accruing on or after August 28, 2017)

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any actual damages including back pay, other past [and future][1] economic losses, and any past [and future][1] emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other non-economic losses as a direct result of the occurrence mentioned in the evidence.

Notes on Use (2018 New)

1. This may be added if supported by the evidence.

Committee Comment (2018 New)

A. During the instruction conference, the parties and the court should discuss (on the record) what damages are supported by the evidence and can properly be argued to the jury. In this way, jury arguments can proceed without undue interruption.

B. In *State ex rel. Diehl v. O'Malley*, 95 S.W.3d 82 (Mo.banc 2003), the Supreme Court held that there is a right to a jury trial in actions for damages under the Missouri Human Rights Act, §§ 213.055 *et seq.*, RSMo. The Missouri legislature specifically recognized such a right to trial by jury in § 213.111.3.

C. For recovery of attorney's fees under the MHRA, see § 231.111.2.

D. If punitive damages are submitted, a punitive damage instruction should be given. See, MAI 10.07. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo.

E. The amendments in S.B. 43 (Laws 2017) to § 213 impose limitations on damages under the MHRA. Damages awarded for employment claims under the MHRA may not exceed back pay and interest on that back pay, plus an additional amount of damages dependent upon the size of the company. See § 213.111.3.

F. The statutory limitations on damages and the calculation of interest on back pay is a judicial function rather than a jury function.

G. For MHRA actions accruing before August 28, 2017, see MAI 4.01.

Historical Note

(S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03 and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo.banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. W.D. 2014) regarding usage of MAI 19.01 in MHRA cases; *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. W.D. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. E.D. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017).

Research References

West's Key Number Digest
Civil Rights ⚷1763 to 1766

Legal Encyclopedias
C.J.S., Civil Rights §§ 800 to 804

38.10 [2018 New] Missouri Human Rights Act—Verdict Form (for actions accruing on or after August 28, 2017)

VERDICT[1]

Note: Complete this form by writing in the name required by your verdict.

On the claim of plaintiff (*state the name*) against defendant (*state the name*),[2] we, the undersigned jurors, find in favor of: ____
(Plaintiff (*state the name*)) or (Defendant (*state the name*))

Note: Complete the following paragraph only if the above finding is in favor of plaintiff (*state the name*).

We, the undersigned jurors, assess the damages of plaintiff (*state the name*) as follows:

For back pay[3] $____ (*stating the amount or, if none, write the word, "none"*).

For past economic losses excluding back pay[4] $____ (*stating the amount or, if none, write the word, "none"*).

For future economic losses[5] $____ (*stating the amount or, if none, write the word, "none"*).

For non-economic losses[6] $____ (*stating the amount or, if none, write the word, "none"*).

Note: All jurors who agree to the above must legibly sign or print their names below.

______________________________ ______________________________

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Notes on Use (2018 New)

1. Verdicts will be designated alphabetically (A, B, C, etc.).

2. Parenthetical directions to "(state the name)" in the above form are addressed to counsel. The appropriate party's name should be typed in the prepared verdict at those points. All other directions are for the jury and should be submitted to the jury as written.

3. Do not submit any category of damage that is not supported by the evidence.

4. A separate verdict form must be used for each "package" other than the package containing the general instructions. The verdict form will be the last instruction in each such package. See MAI 2.00 General Comment for an explanation of "packaging."

5. Verdict forms should not be read by the Court to the jury.

6. For MHRA actions accruing before August 28, 2017, see MAI 36. 01; MAI 36.05.

Committee Comment (2018 New)

A. The amendments in S.B. 43 (Laws 2017) to § 213 place back pay in a category with punitive damages. If punitive damages and back pay are submitted, the verdict form should be modified to include separate findings for back pay and punitive damages. See MAI 36.11.

B. See Illustration 35.19 for an example of a submission of punitive damages in a bifurcated trial pursuant to § 510.263, RSMo.

C. The amendments in S.B. 43 (Laws 2017) to § 213 impose limitations on damages under the MHRA. Damages awarded for employment claims under the MHRA may not exceed back pay and interest on that back pay, plus an additional amount of damages dependent upon the size of the company. See § 213.111.4.

D. The statutory limitations on damages and the calculation of interest on back pay is a judicial function rather than a jury function.

Historical Note

(S.B. 43 (2017), 99th General Assembly, states it "hereby abrogates all Missouri approved instructions specifically addressing civil actions brought under this chapter (Chapter 213) which were in effect prior to August 28, 2017." See S.B. 43, § 213.101.6, RSMo. MAI 38.01(A) and (B), 38.02, 38.03 and 38.04 apply to cases accruing prior to August 28, 2017. For actions accruing on or after August 28, 2017, see MAI 38.03 (verdict directing—wrongful discharge in violation of public policy), MAI 38.05 (verdict directing—retaliatory discharge or discrimination), MAI 38.06 (verdict directing—MHRA employment discrimination), MAI 38.07 (verdict directing—disability disputed), MAI 38.08 (affirmative defense—business judgment), MAI 38.09 (damages), and MAI 38.10 (verdict form).

S.B. 43 (2017), 99th General Assembly, also states it "hereby expressly abrogates" the Supreme Court decision in *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814 (Mo.banc 2007) regarding "contributing factor;" as well as appellate decisions in *Hurst v. Kansas City Missouri School District*, 437 S.W.3d 327 (Mo.App. W.D. 2014) regarding usage of MAI 19.01 in MHRA cases; and *Thomas v. McKeever's Enterprises, Inc.*, 388 S.W.3d 206 (Mo.App. W.D. 2012) regarding a "but for" instruction; and *McBryde v. Ritenour School District*, 207 S.W.3d 162 (Mo.App. E.D. 2006) regarding the issuance of a business judgment instruction. See S.B. 43 (2017), §§ 213.101.2, 213.101.4, 213.101.5, RSMo. These cases may be used for support in actions arising prior to August 28, 2017, but were expressly abrogated by the Missouri legislature for cases arising on or after August 28, 2017).

Research References

West's Key Number Digest
Civil Rights ⟹1018, 1118, 1166, 1201, 1243, 1252, 1753

Legal Encyclopedias
C.J.S., Civil Rights §§ 313 to 320, 743, 799

39.00

MERCHANDISING PRACTICES

39.01 Verdict Directing—Violation of Missouri Merchandising Practices Act

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Research References

West's Key Number Digest

Antitrust and Trade Regulation 🔑133 to 138, 367

A.L.R. Library

A.L.R. Index, Consumer Protection; Instructions to Jury
West's A.L.R. Digest, Antitrust and Trade Regulation 🔑133 to 138, 367

Legal Encyclopedias

Am. Jur. 2d, Consumer and Borrower Protection §§ 274, 276, 278, 280, 281
C.J.S., Credit Reporting Agencies; Consumer Protection §§ 41 to 43, 114 to 116

39.01 [2014 New] Verdict Directing—Violation of Missouri Merchandising Practices Act

Your verdict must be for plaintiff if you believe:

First, plaintiff [purchased] [leased][1] (*here identify merchandise afforded protection under the statute*),[2] and

Second, such [purchase] [lease][1] was primarily for [personal] [family] [household][3] purposes, and

Third, in connection with the [sale] [lease] [advertisement][4] of (*here identify merchandise*) defendant (*here insert the alleged method, act or practice declared unlawful by § 407.020, RSMo, such as "misrepresented the (here repeat the identification from Paragraph First)" or "concealed a material fact"*),[5] and

Fourth, as a direct result of such conduct, plaintiff sustained damage.

Notes on Use (2014 New)

1. Select the appropriate term.

2. Merchandise is defined at § 407.010.4, RSMo, as any "objects, wares, goods, commodities, intangibles, real estate or services."

3. Select one or more of the appropriate term(s). If more than one term is selected, they should be joined by the word "or".

4. Select the appropriate term.

5. The particular term or phrase incorporated from § 407.020, RSMo, may need to be defined. See discussion in Committee Comment, paragraph F.

Committee Comment (2016 Revision)

A. In a private lawsuit for violation of the Missouri Merchandising Practices Act (MMPA), plaintiffs must demonstrate that they (1) purchased merchandise (which includes services) from defendants; (2) for personal, family or household purposes; and (3) suffered an ascertainable loss of money or property; (4) as a result of an act declared unlawful under the Merchandising Practices Act. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d 758, 773 (Mo.banc 2007); *Edmonds v. Hough*, 344 S.W.3d 219 (Mo.App. E.D. 2011).

B. The MMPA prohibits "deception, fraud, false pretense, false promise, misrepresentation, unfair practice or the concealment, suppression, or omission of any material fact in connection with the sale or advertisement of any merchandise in trade or commerce" by defining such activity as an unlawful practice. Section 407.020.1, RSMo. Civil actions may be brought under the MMPA to recover actual damages by "[a]ny person who purchases or leases merchandise primarily for personal, family or household purposes and thereby suffers an ascertainable loss of money or property, real or personal, as a result of [an unlawful practice]." Section 407.025.1, RSMo.

C. The statute does not contain a scienter requirement for civil liability for actual damages. "It is the defendant's conduct, not his intent, which determines whether a violation has occurred." *State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 635 (Mo.App. E.D. 1988). Of course, for punitive damages, a different standard applies. See MAI 10.07.

D. A consumer's reliance on an unlawful practice is not required under the MMPA. *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d at 774; 15 CSR §§ 60-9.020, -9.070, -9.110.

E. An MMPA violation occurs regardless of whether the unlawful practice is committed "before, during or after the sale." Section 407.020.1 RSMo.

F. The Supreme Court has cautioned that terms used in the MMPA may have a broader meaning than similar terms used in common law. The Court noted that MMPA regulations define "material fact" as "any fact which a reasonable consumer would likely consider to be important in making a purchasing decision . . ." 15 C.S.R. 60-9.010(1)(C). This definition of "material fact" is broader than the materiality requirement of common law fraud. See, *Hess v. Chase Manhattan Bank, USA, N.A.*, 220 S.W.3d at 773.

G. Absence of privity of contract is not a defense in an MMPA action. See, *Gibbons v. J. Nuckolls, Inc.*, 216 S.W.3d 667 (Mo.banc 2007).

H. The "voluntary payment doctrine" was held not to be a defense to an action under the MMPA in *Huch v. Charter Communications, Inc.*, 290 S.W.3d 721 (Mo.banc 2009).

I. Under the MMPA, the measure of damages is often determined by the "benefit of the bargain" rule. See MAI 4.03; *Sunset Pools of St. Louis, Inc. v. Schaefer*, 869 S.W.2d 883 (Mo.App. E.D. 1994), and *Shiplet* *v. Copeland*, 450 S.W.3d 433 (Mo.App. W.D. 2014). Missouri Courts have recognized that where the benefit of the bargain rule is inadequate, other measures of damages may be used. See MAI 4.01; *Kerr v. Vatterott Educational Centers, Inc.*, 439 S.W.3d 802 (Mo.App. W.D. 2014) (MAI 4.01 held appropriate where a case involved intangible services and the value of the education was zero). Where plaintiff receives nothing of value, the benefit of the bargain rule does not apply. See *Lollar v. A.O. Smith Harvestore Products, Inc.*, 795 S.W.2d 441, 450–51 (Mo.App. W.D. 1990) (purchaser who received nothing of value, may properly recover the amount paid with interest from the date of payment, plus incidental losses and expenses suffered as a result of the seller's misrepresentations). See also, *Herberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo.banc 1988) ("[t]he benefit of the bargain rule does not apply where the purchaser rescinds and returns the property received or where he received nothing of value.").

Research References

West's Key Number Digest
Antitrust and Trade Regulation ⚷133 to 138, 367

Legal Encyclopedias
C.J.S., Credit Reporting Agencies; Consumer Protection §§ 41 to 43, 114 to 116

Table of Effective Dates of Instructions

The development of a good civil instruction system is a continually evolving process which arises both from the necessity to accommodate changes in the law and the improvements which can be obtained by revising existing instructions to meet unforeseen problems which inevitably surface as a particular instruction is put to use. The practicing bar and the judiciary are kept currently informed as to such changes in Instructions, Notes on Use and Committee Comments by the publication of current changes in the Missouri Bar Journal and ultimately in a pocket part or supplement to the bound volume.

MAI Eighth Edition brings together a particularly large number of such changes because the Committee and the Court have been very active during the recent period in updating and improving the civil instruction system. The following table is included to provide a source of information of the effective date of all current versions of instructions as of the publication of MAI Eighth Edition.

The date and designation "New" or "Revision" in the caption of each instruction indicates whether the current version of the instruction is as originally adopted or a revision and the year in which this version of the instruction first became effective. This designation is provided for use as part of the citation to the instruction (e.g., MAI 33.03 [1995 Revision]) so that reference to a particular instruction by citation, such as in a case opinion, will disclose the particular version of the instruction referred to. This becomes particularly significant when referring to an instruction which has had substantial revision at one time or another.

The designation Withdrawn means the instruction is no longer approved for use by the Court. The Notes on Use and Committee Comment to such instructions have also been withdrawn.

	INSTRUCTION NO.	INSTRUCTION	NOTES ON USE	COMMITTEE COMMENT
E	Chapter E1.00—Early Case Summary			
	MAI E1.00	2021 Revision	—	—
	MAI E1.01	2017 New	2017 New	2017 New
I	Chapter 1.00—Prohibited Instructions			
	MAI 1.00	2021 Revision	—	—
	MAI 1.01	1965 New	—	2021 Revision
	MAI 1.02	1965 New	—	1996 Revision

TABLE OF EFFECTIVE DATES

	INSTRUCTION NO.	INSTRUCTION	NOTES ON USE	COMMITTEE COMMENT
	MAI 1.03	1965 New	—	1981 Revision
	MAI 1.04	1965 New	—	1965 New
	MAI 1.05	1965 New	—	1981 Revision
	MAI 1.06	2012 Revision	—	2012 Revision
II	Chapter 2.00—Explanatory			
	MAI 2.00	2017 Revision	—	—
	MAI 2.00(A)	2014 New	—	2014 New
	MAI 2.00(B)	2021 Revision	—	—
	MAI 2.00(C)	2020 New	2020 New	2020 New
	MAI 2.01	2021 Revision	2008 Revision	2014 Revision
	MAI 2.02	1980 Revision	1980 Revision	1980 Revision
	MAI 2.03	2005 Revision	1980 New	2005 New
	MAI 2.03(A)	2020 New	2020 New	2020 New
	MAI 2.04	1981 Revision	1980 New	2017 New
	MAI 2.05	1980 New	1980 New	—
	MAI 2.06	2006 Revision	2006 Revision	—
	MAI 2.07	2012 New	—	2014 Revision
III	Chapter 3.00—Burden of Proof			
	MAI 3.01	2016 Revision	1998 Revision	1981 Revision
	MAI 3.02	Withdrawn 2008	—	—
	MAI 3.03	Withdrawn 2012	—	—
	MAI 3.04	2017 Revision	2017 Revision	2017 Revision
	MAI 3.05	2017 Revision	1989 Revision	1980 New
	MAI 3.06	2017 Revision	1989 Revision	1980 New
	MAI 3.07	2017 Revision	—	1983 New
	MAI 3.08	1998 Revision	1994 New	2017 Revision
IV	Chapter 4.00—Damages—General			
	MAI 4.01	2002 Revision	2002 Revision	2002 Revision
	MAI 4.02	1980 Revision	2002 Revision	1969 New
	MAI 4.03	1969 New	1981 Revision	1969 New
	MAI 4.04	1981 Revision	1981 Revision	2012 Revision
	MAI 4.05	1996 Revision	1996 New	—
	MAI 4.06	1996 Revision	1996 New	—
	MAI 4.07	1996 Revision	1996 New	1980 Revision
	MAI 4.08	1980 New	1980 New	—
	MAI 4.09	1980 Revision	1980 Revision	—
	MAI 4.10	Withdrawn 2012	—	—
	MAI 4.11	Withdrawn 2012	—	—
	MAI 4.12	1979 New	1979 New	1996 Revision
	MAI 4.13	1979 New	1979 New	1996 Revision
	MAI 4.14	1979 New	1979 New	1996 Revision
	MAI 4.15	1980 New	1980 New	1980 New
	MAI 4.16	1980 New	1996 Revision	—

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	INSTRUCTION NO.	INSTRUCTION	NOTES ON USE	COMMITTEE COMMENT
	MAI 4.17	1980 New	1996 Revision	1980 New
	MAI 4.18	1991 New	2002 Revision	1991 New
V	Chapter 5.00—Damages—Wrongful Death			
	MAI 5.01	1996 Revision	1996 Revision	2021 Revision
	MAI 5.02	Withdrawn 1981	—	—
	MAI 5.03	Withdrawn 1981	—	—
	MAI 5.04	Withdrawn 1981	—	—
	MAI 5.05	Withdrawn 1981	—	—
	MAI 5.06	Withdrawn 1981	—	—
	MAI 5.07	Withdrawn 1981	—	—
	MAI 5.08	Withdrawn 1981	—	—
	MAI 5.09	Withdrawn 1981	—	—
VI	Chapter 6.00—Damages—Wrongful Death—Mitigating and Aggravating Circumstances			
	MAI 6.01	1996 Revision	1965 New	2002 New
	MAI 6.02	1998 Revision	—	2008 Revision
VII	Chapter 7.00—Damages—Joint Tort-Feasors			
	MAI 7.01	Withdrawn 1983	—	1983 Revision
	MAI 7.02	1983 Revision	1983 Revision	1983 Revision
VIII	Chapter 8.00—Damages—Federal Employers' Liability Act			
	MAI 8.01	Withdrawn 2012	—	—
	MAI 8.02	Withdrawn 2012	—	—
IX	Chapter 9.00—Eminent Domain			
	MAI 9.01	2012 Revision	2012 Revision	2012 Revision
	MAI 9.02	2012 Revision	2012 Revision	2012 Revision
	MAI 9.03	2017 Revision	2008 New	2008 New
	MAI 9.04	2008 New	2008 New	—
	MAI 9.05	2008 New	2008 New	—
	MAI 9.06	2008 Revision	—	2008 Revision
	MAI 9.07	2008 Revision	—	2008 Revision
X	Chapter 10.00—Damages—Exemplary			
	MAI 10.00	2012 New	—	—
	MAI 10.01	2008 Revision	2008 Revision	2012 Revision
	MAI 10.02	2008 Revision	2008 Revision	2012 Revision
	MAI 10.03	1983 Revision	—	—
	MAI 10.04	2008 Revision	2008 Revision	2012 Revision
	MAI 10.05	2008 Revision	2008 Revision	2012 Revision
	MAI 10.06	2008 Revision	2008 Revision	2012 Revision

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	INSTRUCTION NO.	INSTRUCTION	NOTES ON USE	COMMITTEE COMMENT
	MAI 10.07	2008 Revision	2008 Revision	2012 Revision
	MAI 10.08	1992 New	1992 New	1992 New
XI	Chapter 11.00—Definitions—Negligence			
	MAI 11.01	1996 Revision	1978 Revision	—
	MAI 11.02	1996 Revision	1996 Revision	—
	MAI 11.03	1996 Revision	1978 New	1978 New
	MAI 11.04	1996 Revision	1996 Revision	1996 Revision
	MAI 11.05	1996 Revision	1996 Revision	—
	MAI 11.06	1990 Revision	1990 Revision	2007 Revision
	MAI 11.07	1996 Revision	1978 New	1978 New
	MAI 11.08	1996 Revision	1978 New	—
	MAI 11.09	Withdrawn 1996	—	—
	MAI 11.10	1996 Revision	1988 New	1988 New
XII	Chapter 12.00—Uninsured and Underinsured Motor Vehicle			
	MAI 12.00	2012 Revision	—	—
	MAI 12.01	1988 Revision	1988 Revision	—
	MAI 12.02	1978 New	1978 New	—
	MAI 12.03	2012 Revision	1988 Revision	—
	MAI 12.04	2012 Revision	1978 New	—
	MAI 12.05	2012 Revision	1988 Revision	—
	MAI 12.06	2012 Revision	2002 Revision	—
	MAI 12.07	2012 Revision	1980 New	1980 New
	MAI 12.08	2012 Revision	1980 New	—
XIII	Chapter 13.00—Definitions—Agency			
	MAI 13.01	2011 Revision	—	—
	MAI 13.02	1978 Revision	1978 Revision	2011 Revision
	MAI 13.03	1990 Revision	1990 Revision	1965 New
	MAI 13.04	1990 Revision	1990 Revision	1965 New
	MAI 13.05	1990 Revision	1990 Revision	1965 New
	MAI 13.06	1990 Revision	2011 Revision	2011 Revision
	MAI 13.07(1)	1996 Revision	1986 New	1986 New
	MAI 13.07(2)	1996 Revision	1986 New	1986 New
XIV	Chapter 14.00—Definitions—Yield the Right-of-Way			
	MAI 14.01	1978 Revision	—	—
	MAI 14.02	1978 Revision	1978 Revision	1990 Revision
	MAI 14.03	1978 Revision	1978 Revision	1990 Revision
	MAI 14.04	1978 Revision	1978 Revision	1996 Revision
	MAI 14.05	1978 Revision	1978 Revision	1996 Revision
	MAI 14.06	1978 Revision	1978 Revision	1996 Revision
	MAI 14.07	1978 Revision	1978 Revision	1996 Revision
	MAI 14.08	1978 New	1978 New	—

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	INSTRUCTION NO.	INSTRUCTION	NOTES ON USE	COMMITTEE COMMENT
	MAI 14.09	1990 New	1990 New	1990 New
XV	Chapter 15.00—Will Contest			
	MAI 15.01	1969 New	1978 New	1969 New
	MAI 15.02	2012 Revision	2012 Revision	—
	MAI 15.03	2012 Revision	1995 Revision	1995 New
	MAI 15.04	2012 Revision	1978 Revision	2012 Revision
	MAI 15.05	2012 Revision	1995 New	—
	MAI 15.06	2012 Revision	2012 Revision	—
	MAI 15.07	2012 Revision	2012 Revision	—
	MAI 15.08	2012 Revision	2012 Revision	—
	MAI 15.09	2012 Revision	—	2012 Revision
	MAI 15.10(A)	2012 Revision	2012 Revision	—
	MAI 15.10(B)	2012 Revision	2012 Revision	—
XVI	Chapter 16.00—Definitions—Miscellaneous			
	MAI 16.01	Withdrawn 1996	—	—
	MAI 16.01(1)	1996 New	1996 New	1996 New
	MAI 16.01(2)	1996 New	1996 New	1996 New
	MAI 16.02	2008 Revision	2008 Revision	—
	MAI 16.03	Withdrawn 2012	—	—
	MAI 16.04	1980 New	1996 Revision	1980 New
	MAI 16.05	1996 Revision	—	1996 Revision
	MAI 16.06	1996 Revision	—	1996 Revision
	MAI 16.07	1983 New	1983 New	—
	MAI 16.08	1992 New	1992 New	1996 New
XVII	Chapter 17.00—Verdict Directing—Motor Vehicles			
	MAI 17.01	1980 Revision	1996 Revision	1996 Revision
	MAI 17.02	1980 Revision	1996 Revision	1996 Revision
	MAI 17.03	1965 New	1990 Revision	1965 New
	MAI 17.04	1978 Revision	1990 Revision	1965 New
	MAI 17.05	1965 New	2012 Revision	2012 New
	MAI 17.06	1965 New	1990 Revision	1965 New
	MAI 17.07	Withdrawn 2000	—	—
	MAI 17.08	1965 New	1965 New	1996 Revision
	MAI 17.09	1965 New	1990 Revision	1996 Revision
	MAI 17.10	1965 New	1990 Revision	1996 Revision
	MAI 17.11	1965 New	1965 New	1965 New
	MAI 17.12	1965 New	1990 Revision	1996 Revision
	MAI 17.13	1978 Revision	1990 Revision	1978 Revision
	MAI 17.14	Withdrawn 1990	—	—
	MAI 17.15	Withdrawn 1990	—	—
	MAI 17.16	1973 Revision	1990 Revision	1990 Revision
	MAI 17.17	1978 Revision	2015 Revision	2012 Revision
	MAI 17.18	1978 Revision	2015 Revision	2012 Revision

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	MAI 17.19	1969 New	1990 Revision	1969 New
	MAI 17.20	1969 New	1969 New	1996 Revision
	MAI 17.21	1993 New	1996 Revision	2012 Revision
XVIII	Chapter 18.00—Verdict Directing—Agency In Issue			
	MAI 18.01	2017 Revision	2012 Revision	1965 New
XIX	Chapter 19.00—Verdict Directing—Multiple Causes of Damage			
	MAI 19.01	1986 Revision	2012 Revision	1995 New
XX	Chapter 20.00—Verdict Directing—Wrongful Death			
	MAI 20.01	1981 Revision	1996 Revision	2021 Revision
	MAI 20.02	1983 Revision	1996 Revision	2021 Revision
XXI	Chapter 21.00—Actions Against Health Care Providers			
	MAI 21.00	2012 New	—	—
	MAI 21.01	1988 Revision	1990 Revision	2012 Revision
	MAI 21.02	1988 New	1988 New	2012 Revision
	MAI 21.03	1988 New	2002 Revision	2012 Revision
	MAI 21.04	1988 New	2002 Revision	2012 Revision
	MAI 21.05	1988 New	1991 Revision	2012 Revision
	MAI 21.06	2012 Revision	—	2012 Revision
	MAI 21.07	2016 Revision	—	—
	MAI 21.08	1995 Revision	1993 New	2012 Revision
	MAI 21.09	1996 Revision	1996 Revision	2021 Revision
	MAI 21.10	1993 New	1993 New	1993 New
	MAI 21.11	1996 Revision	1996 Revision	2002 Revision
	MAI 21.12	1994 New	2002 Revision	2002 Revision
	MAI 21.13	1994 New	1994 New	1994 New
	MAI 21.14	1994 New	1994 New	1994 New
	MAI 21.15	1994 New	2002 Revision	1994 New
XXII	Chapter 22.00—Verdict Directing—Owners and Occupiers of Land			
	MAI 22.00	2011 New	—	—
	MAI 22.01	1996 Revision	1991 Revision	2021 Revision
	MAI 22.02	2021 Revision	1991 Revision	2021 Revision
	MAI 22.03	2021 Revision	1989 Revision	2021 Revision
	MAI 22.04	Withdrawn 1993	—	—
	MAI 22.05	1981 Revision	1996 Revision	2021 Revision
	MAI 22.06	1969 New	1991 Revision	2021 Revision
	MAI 22.07	1991 Revision	1991 Revision	2021 Revision
	MAI 22.08	1978 New	1990 New	2021 Revision
	MAI 22.09	1993 New	1993 New	2021 Revision
	MAI 22.10	2006 New	2006 New	2021 Revision

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	MAI 23.03	1965 New	1990 Revision	1996 Revision
	MAI 23.04	1983 Revision	1980 Revision	2012 Revision
	MAI 23.05	2007 Revision	2016 Revision	2016 Revision
	MAI 23.06	Withdrawn 1980	—	—
	MAI 23.06(1)	1980 New	1980 New	1980 New
	MAI 23.06(2)	1980 New	1980 New	1990 Revision
	MAI 23.07	2000 Revision	2000 Revision	1996 Revision
	MAI 23.08	1990 Revision	1990 Revision	1990 Revision
	MAI 23.09	Withdrawn 1980	—	—
	MAI 23.10	Withdrawn 1980	—	—
	MAI 23.10(1)	1980 New	1980 New	1995 Revision
	MAI 23.10(2)	1980 New	1980 New	1995 Revision
	MAI 23.11	1981 Revision	1991 Revision	1991 Revision
	MAI 23.12(1)	1989 New	1989 New	1989 New
	MAI 23.12(2)	1989 New	1989 New	1989 New
	MAI 23.13	Withdrawn 2012	—	—
	MAI 23.14	2006 New	2006 New	2006 New
XXIV	Chapter 24.00—Federal Employers' Liability Act			
	MAI 24.01	Withdrawn 2008	—	—
	MAI 24.01(A)	2016 Revision	2016 Revision	2016 Revision
	MAI 24.01(B)	2016 Revision	2016 Revision	2016 Revision
	MAI 24.02	2016 Revision	2016 Revision	2016 Revision
	MAI 24.03	2016 Revision	2016 Revision	2016 Revision
	MAI 24.04(A)	2012 Revision	1996 New	1996 New
	MAI 24.04(B)	2012 Revision	2008 Revision	2016 Revision
	MAI 24.05	2012 Revision	1978 New	—
	MAI 24.06	2012 Revision	1996 Revision	2017 Revision
	MAI 24.07	2012 Revision	2010 Revision	2017 Revision
XXV	Chapter 25.00—Verdict Directing—Breach of Warranty and Product Liability			
	MAI 25.01	1981 Revision	1981 New	1965 New
	MAI 25.02	1981 Revision	1981 New	1996 Revision
	MAI 25.03	1980 Revision	1980 Revision	1980 Revision
	MAI 25.04	1978 Revision	1991 Revision	1978 Revision
	MAI 25.05	1978 New	1991 Revision	—
	MAI 25.06	Withdrawn 1990	—	—
	MAI 25.07	1991 Revision	1991 Revision	1991 Revision
	MAI 25.08	1980 New	1991 Revision	1991 Revision
	MAI 25.09	1990 New	1990 New	2021 Revision
	MAI 25.10(A)	1990 New	1990 New	2021 Revision
	MAI 25.10(B)	1995 Revision	1990 New	2021 Revision

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	MAI 26.02	1980 Revision	1980 Revision	—
	MAI 26.03	1969 New	1969 New	—
	MAI 26.04	1981 Revision	1981 Revision	—
	MAI 26.05	1980 Revision	1980 Revision	1991 New
	MAI 26.06	1981 Revision	1980 Revision	1973 New
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XXVII	Chapter 27.00—Ejectment			
	MAI 27.01	1981 Revision	1981 Revision	—
	MAI 27.02	1981 Revision	1981 Revision	—
	MAI 27.03	1978 New	1978 New	1978 New
	MAI 27.04	1981 Revision	1981 Revision	1978 New
	MAI 27.05	2012 Revision	2002 Revision	2012 New
	MAI 27.06	2012 Revision	1978 New	1978 New
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	MAI 28.00	1980 Revision	—	—
	MAI 28.01	1969 New	1991 Revision	1969 New
	MAI 28.02	1969 New	1969 New	1969 New
	MAI 28.03	1969 New	1969 New	1969 New
	MAI 28.04	1969 New	1969 New	1969 New
XXIX	Chapter 29.00—Verdict Directing—Real Estate Commissions			
	MAI 29.01	1978 Revision	1978 Revision	1996 Revision
	MAI 29.02	1978 Revision	1978 Revision	1991 Revision
	MAI 29.03	1978 Revision	1978 Revision	1978 Revision
	MAI 29.04	1978 Revision	1978 Revision	1978 Revision
	MAI 29.05	Withdrawn 1980	—	—
XXX	Chapter 30.00—Verdict Directing—Third Party Plaintiff			
	MAI 30.01	1969 New	1980 Revision	1969 New
	MAI 30.02	1969 New	1969 New	1969 New
	MAI 30.03	1969 New	1991 Revision	2012 Revision
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	MAI 31.01	Withdrawn 1978	—	—
	MAI 31.02(1)	1997 Revision	1997 Revision	2012 Revision
	MAI 31.02(2)	1997 Revision	1997 Revision	2012 Revision
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MAI 31.03	1981 Revision	1981 Revision	1996 Revision
MAI 31.04	1991 Revision	1991 New	1991 New
MAI 31.05	Withdrawn 2008	—	—
MAI 31.06	Withdrawn 2012	—	—
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MAI 31.07(A)	2016 New	2016 New	2016 New
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MAI 31.09	1978 New	1978 New	—
MAI 31.10	Withdrawn 2012	—	—
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MAI 31.12	Withdrawn 2012	—	—
MAI 31.13	Withdrawn 2012	—	—
MAI 31.14	2000 Revision	2000 Revision	2000 Revision
MAI 31.15	1992 New	1992 New	2021 Revision
MAI 31.16	2021 Revision	2016 New	2021 Revision
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MAI 31.18	1994 New	—	1998 Revision
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MAI 31.20	1994 New	1994 New	1998 New
MAI 31.21	Withdrawn 2012	—	—
MAI 31.22	Withdrawn 2012	—	—
MAI 31.23	2000 New	2000 New	2000 New
MAI 31.24	Withdrawn 2012	—	—
MAI 31.25	Withdrawn 2012	—	—
MAI 31.26	2007 New	2007 New	2021 Revision
MAI 31.27	Withdrawn 2012	—	—
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MAI 32.01(2)	1991 Revision	1991 Revision	—
MAI 32.01(3)	1991 Revision	1991 Revision	—
MAI 32.02	1991 Revision	1991 Revision	1969 New
MAI 32.03	1991 Revision	1991 Revision	1969 New
MAI 32.04	1991 Revision	1991 Revision	1969 New
MAI 32.05	1991 Revision	1991 Revision	—
MAI 32.06	1991 Revision	1991 Revision	1996 Revision
MAI 32.07	Withdrawn 1996	—	—
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	MAI 32.18	Withdrawn 2012	—	—
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	MAI 32.24	1978 New	—	1978 New
	MAI 32.25	1981 New	1981 New	1981 New
	MAI 32.26	1990 New	1990 New	—
	MAI 32.27	1990 New	1990 New	—
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	MAI 33.06	Withdrawn 1990	—	—
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	MAI 34.04	Withdrawn 2012	—	—
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MAI 35.04	2021 Revision	—	1991 New
MAI 35.05	2021 Revision	—	1996 Revision
MAI 35.06(1)	Withdrawn 1991	—	—
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MAI 35.08	Withdrawn 2008	—	—
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MAI 35.11	Withdrawn 1991	—	—
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MAI 35.14	2021 Revision	—	1986 New
MAI 35.15	2021 Revision	—	1996 Revision
MAI 35.16	2021 Revision	—	1991 New
MAI 35.17	2021 Revision	—	1991 New
MAI 35.18	2021 Revision	—	1991 New
MAI 35.19	2021 Revision	1992 New	2012 Revision
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MAI 36.03	Withdrawn 1980	—	—
MAI 36.04	Withdrawn 1980	—	—
MAI 36.05	1980 Revision	1996 Revision	—
MAI 36.06	1980 Revision	1980 New	—
MAI 36.07	Withdrawn 1980	—	—
MAI 36.08	Withdrawn 1980	—	—
MAI 36.09	Withdrawn 1980	—	—
MAI 36.10	1980 Revision	1980 New	1996 New
MAI 36.11	1980 Revision	1980 New	—
MAI 36.12	1980 Revision	2012 Revision	2012 New
MAI 36.13	Withdrawn 2012	—	—
MAI 36.14	Withdrawn 2012	—	—
MAI 36.15	1979 New	1979 New	1996 Revision
MAI 36.16	1979 New	1996 Revision	—
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